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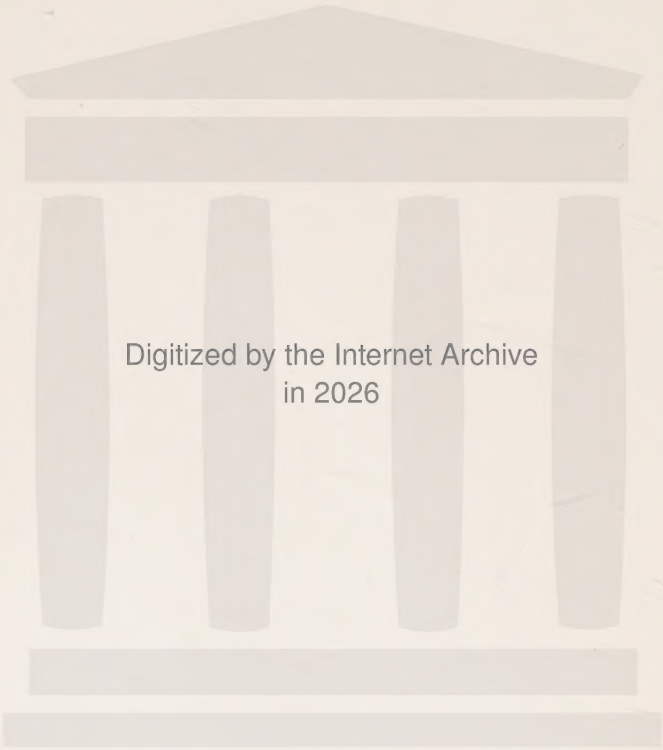
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The Essentials of American Constitutional Law

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"It is a Constitution we are expounding."—*John Marshall*

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PREFACE

THE principles of American constitutional law are the foundation of all judicial decisions, and it is (as Marshall observes) "the province and duty of the Courts to say what the law is." Judicial decisions, however, are technical, are handed down by experts, and set forth authoritatively as results of experience which the junior student of the law is likely to find difficult, if not incomprehensible. But to attempt merely to simplify the law, or its interpretation by the Courts, is likely to result in variation from the original spirit and purpose of the law: because decisions are essentially a reduction of questions at issue to a principle, and laws themselves are (or ought to be) simple, clear, comprehensive, and complete.

For purposes of study or instruction it is necessary to bring the principle involved in a law (be it the Supreme Law of the Land,—that is, the Constitution, a Treaty, or an Act of Congress; or a State Constitution, or an Act of a State Legislature) within the compass of a principle, or a fundamental, by examina-

tion of an issue, or issues, in which the principle is involved. There must ever be before the Court the issue *and* the law, and the law itself may be an issue, in the American system of government which recognizes the authority of the Court to pass on the constitutionality of the law.

But principles are not numerous. Possibly in Nature there is but one basic principle and all our so-called "natural laws" are but aspects of that principle as the human mind conceives or recognizes it. The analogy in government permits the assertion that the principles of constitutional law are few. Possibly they are severally aspects of one principle: that of sovereignty. To the student of the law, especially to junior students, principles are matters of memory rather than of understanding. It is a vigorous and essentially mature mind that can reduce a complex issue to such simple form as to deduce the principle on which it rests.

Books on American constitutional law should be simple, comprehensive, authoritative, and specially adapted to the conditions under which the subject is pursued. In later years the subject is usually approached through two books: a treatise on constitutional law, and a book (collection) of leading cases illustrative of the principles involved. The tendency is toward bulky volumes. Meanwhile other subjects than constitutional law,—other

branches of the law,—must be pursued. Multiplicity of subjects is characteristic of the curriculum whether at Law School or at College or University. Time is brief: studies are many. The necessary result is concentration upon the essentials of a subject,—careful isolation of its principles together with familiarity with authoritative illustrations of their application. This means a small, compact, authoritative book on the subject. There are few principles,—there are innumerable applications of them. Values are twofold,—perception of the principle, and understanding of its application. The question is not "What principle?" but rather, "What application?" Thus the student of law may wisely be led to consider, to weigh, to study the great or the leading application of a principle: that is, he is properly directed to the important decisions of the Courts of Law. In America, these decisions are handed down by the Supreme Courts of States and the Supreme Court of the United States. From these decisions the principles of our constitutional law may be derived. Great writers, like Hamilton, Madison, Kent, Story, or Cooley, must be listened to: but it is the Court of Law that speaks with authority. Our great writers on constitutional law and our great judges sitting as Courts of Law practically agree as to what comprise the principles of our constitutional law.

Whether the principles of the law are reached by induction or by deduction does not affect the principles. Judicial decisions illustrate both methods of approach. Stated broadly,—a treatise on constitutional law sets forth its principles and cites decisions as illustrations of their application; a collection of cases provides many illustrations from which the principles may be, or are, deduced. By combining the treatise and the case-book (and the present volume may be used in connection with any of the current "Collections" of "Leading Cases") the benefits of both methods,—deductive and inductive,—are realized. Whether the two sorts of books are used together, or in succession, must depend upon the time, the place, and the importance assigned to the subject itself. Highly beneficial results have followed when a first semester has been given to the treatise, and a second to the cases, whether in a "Collection" (of which there are several of highest value now in use), or in the original "Reports."

But constitutional law is more than a technical subject for a Law School: it is a branch or part of the study of government,—of political philosophy so-called. It is a branch of "Politics" as Aristotle uses that word. Hence it is also a "culture" study, entitled to a respectable place in the curriculum of College or University. But as such a study, it must also be pursued as are other branches of philosophy.

Whatever part it has as dialectics it also has part in the interpretation of the government,—of the sovereignty behind that government,—under which we live. The difficulties of constitutional law are also the difficulties of government and of philosophy itself.

Shall the college man leave college with a fair knowledge of the principles of the Supreme Law under which he lives? That is the question. Whatever book or books or method best brings that consummation is the best.

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The Essentials of American Constitutional Law

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CHAPTER I

THE SUPREME LAW

1. The supreme law of the land is the Constitution, and acts of Congress and treaties made under its authority. By this supreme law the judges in every State are bound, "anything in the constitution or laws of any State to the contrary notwithstanding." All legislative, executive, and judicial officers both of the United States and of the several States are bound by oath or affirmation to support the Constitution, and in our actual government, every administrative official, State or national, is bound in like manner.[1] Aliens becoming American citizens by naturalization, —by which they disavow allegiance to any other sovereignty,—solemnly bind themselves, by oath or affirmation, to support the Constitution. Every

[1] Art. vi., 2, 3, and Preamble.

citizen is impliedly under oath to support the Constitution.

2. Such supremacy of the Constitution is essential to American sovereignty. The people of the United States ordained and established this supreme law. They are sovereign. The oath or affirmation to support it is the formal and sovereign promise of fidelity to that sovereign, to any sovereign, or quasi-sovereign,—for example, to England, France, or a State in the American Union. The supreme law of a sovereignty,—its "constitution," may be written, like ours, or partly unwritten, as the British constitution. The essential fact is of the supremacy of the law because of the sovereignty of the law-giver.

3. The laws of the United States are made by Congress and the President, or by Congress alone over his veto.[1] The laws of a State are made by its legislature and governor, or by the legislature alone over his veto; but Congress, the President, State legislature and governors are only agents of their sovereign: they possess *derivative*, not *original*, powers; they *represent* sovereignty. The American sovereign is "We the People" of the United States, and for many purposes, "We the People" of the respective States. All government in America is representative government. The sovereign makes laws through its agents or representatives. No other

[1] Art. i., 7:2.

method is possible in a sovereignty conceived and operating as ours. Whether the law thus formulated be a constitution,—national or State,—an act of Congress or of Assembly, it is an expression, on the principle of agency, of the will of the sovereign. The Convention that frames a constitution is an agent of sovereignty; the Congress or State Legislature that enacts a law is an agent of that sovereignty, and that sovereignty prescribes through its agents the method of ratifying and administering that law. Through other agents, e. g., the judiciary, that sovereignty interprets constitutions and laws.[1] Legislative, exe-

[1] The Supreme Court of Mississippi in Sproule *v.* Fredericks, 69 Miss. 898 (1892), decided that the Constitutional Convention of that State (1890) "wielded the powers of sovereignty specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole Commonwealth." The Supreme Court of Pennsylvania in Wells *v.* Bain, 75 Pa. St. 39 (1874), decided that the Convention of 1872 was "not a co-ordinate branch of the government," and possessed only "delegated powers." The Supreme Court of the United States, through Marshall, C. J., decided in McCulloch *v.* Maryland, 4 Wheaton, 316 (1819), that the Constitution which came from the hands of the Federal Convention of 1787 "was a mere proposal, without obligation, or pretensions to it. By the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments. From these conventions

cutive, judicial, and administrative officials constitute the governmental group, the public servants to whom, for a term, the sovereign delegates some of its powers. The members of this group are agents of the sovereign and are answerable to that sovereign as is the agent to his principal.

4. Madison, in *The Federalist*, states the whole case: A republic is

a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is sufficient for such a govern-

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the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived by the State governments. The Constitution when thus adopted was of complete obligation, and bound the State sovereignties." The character of the Constitution, its purport and principles, is examined in Martin *v.* Hunter's Lessee, 1 Wheaton, 304 (1816). Decision by Story, J.

ment that the persons administering it be appointed, either directly or indirectly, by the people, and that they held their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.[1]

5. The supreme law of the land represents the will of the people of the United States for purposes of government. The authority of that law is derived wholly from the people. They may change or amend it at any time. They prescribe the procedure for such change or amendment.[2] Through this supreme law the entire public business is carried on. The constitution of Massachusetts sets forth the essential fact:

All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.[3]

The distinction between original and derivative powers made by the constitution of Massachusetts is true of the supreme law of the United States.

6. The quality of supremacy involves and implies sovereignty. Sovereignty is indefinable; is not,

[1] No. xxxix. [2] Art. v.

[3] Constitution (1780 to date) Pt. I. Art. iv. The words "substitutes and agents" may be considered equivalent to the modern words "administrative officers."

strictly speaking, comprehensible. There is therefore a difference between sovereignty and government. Sovereignty ordains and establishes a form of government. The form varies among different peoples and at different times. The Constitution declares that "The United States guarantees to every State in this Union a republican form of government."[1] This form, in America, is the creation, that is, the creature, of the sovereign, the people. The essential matter here is of powers and relations, and is made clear by Chief Justice Marshall: The government of the United States proceeds directly from the people; is ordained and established in their name for definite purposes declared in the Preamble to the Constitution, and the assent of the States in their sovereign capacity is implied in calling the Convention of 1787, which framed the Constitution, and in submitting that instrument to the people. The people were at perfect liberty to accept or to reject it, and their act was final. It required not the affirmance and could not be negatived by the State governments. When thus adopted, the Constitution was of complete obligation, and bound the State sovereignties.[2] But had not the people of America, in 1787, already surrendered all their powers to the State sovereignties and had nothing more to give? The question whether

[1] Art. iv., 4.

[2] McCulloch *v.* Maryland, note, *supra.*

they may resume and modify the powers granted to their government cannot be raised in this country. The people always possess that power and since 1787 they have exercised it in making seventeen amendments to the Constitution. The legitimacy of the general government might be doubted had it been created by the States, for the States, as governments, are creations of the people, and possess only derivative powers. "The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves." The States were competent to form a league, such as was the Confederation of 1781,

but when "in order to form a more perfect Union" it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them and are to be exercised directly on them, and for their benefit. This government is acknowledged by all to be one of enumerated powers. But the question respecting the extent of the powers actually granted is perpetually recurring, and will probably continue to arise as long as our system shall exist. The government of the Union, though limited in its powers, is supreme within its sphere of action.[1]

[1] McCulloch *v.* Maryland, note, *supra.*

This supremacy results from the nature of the government.

It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have in express terms decided it by saying, this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made under its authority, shall be the supreme law of the land, and by requiring executive, legislative, judicial (and administrative) officers to take the oath of fidelity to it.[1]

7. The question of sovereignty arises here and, as commonly stated, of national sovereignty and of State sovereignty. The equal vote allowed each State by the Constitution,[2] "is at once a recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty."[3] Are there two sovereignties in America?

The sovereignty of a State [declares Marshall], extends to everything which exists by its authority, or is introduced by its permission; but does not extend to these means which are employed by Congress to carry into execution powers conferred on that body by the people

[1] *Idem.* (The language of the Court slightly paraphrased.)
[2] Art. v.
[3] *The Federalist*, No. lxii.

of the United States. These powers are not given by the people of a single State, but by the people of the United States to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.[1]

8. The exercise of the taxing power illustrates the principle here involved. The power of taxation residing in a State measures the extent of sovereignty which the people of a single State possess, and can confer on its government.

We have a principle (here) [continues Marshall], which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all these powers which are conferred by the people of the United States on the government of the Union, and all these means which are given for the purpose of carrying these powers into execution. We have a principle which is safe for the States and safe for the Union. . . . The people of the United States did not design to make their government dependent on the States. The government of the Union possesses general powers of taxation. . . . The people of all the States and the States themselves are represented in Congress, and by their representatives exercise this power. When they tax the chartered institutions of the States, they tax their constituents and these taxes must be uniform.[2] But when a State taxes the operations of the government of the United States, it acts upon institutions created not by their own constitu-

[1] McCulloch *v.* Maryland.

[2] Art. i., 8 : 1; but see Amendment XVI.

ents, but by people over whom they claim no control. It acts upon the measures of a government created by others, as well as themselves; for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole, between the laws of a government declared to be supreme, and these of a government which, when in opposition to those laws, is not supreme. . . . In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to the other.[1]

Plainly the essential matter here is one of functions. Neither the government of the United States nor that of a State is sovereign, for each possesses only delegated powers. But the powers delegated to the two governments are not for all purposes the same, or of equal extent. The two governments have different jurisdictions. Distinctively federal functions are not State functions, as, for example, the distinctively Federal functions of coining money, making treaties, and declaring war.[2] On the other hand, distinctively State functions are the exercise of the police power of the State,[3] the control of intrastate commerce, the power of extradition between

[1] McCulloch *v.* Maryland.

[2] Articles i., 8 : 5; ii., 2: 2; i., 10 : 3; i., 8 : 2.

[3] The License Cases, 5 Howard, 504 (1846); Kimmish *v.* Ball, 129 U. S., 217 (1889); Cook *v.* Marshall Company, 196 U. S., 261.

States,[1] the validity in a State of the public acts, records, and judicial proceedings of another State[2] and the right of citizens of each State to all privileges and immunities of citizens in the several States.[3]

9. The question of the relative sovereignty of the United States and that of a State is one of jurisdiction, and is determined by extent of powers delegated, not of original powers possessed. Delegated powers are expressed in constitutions and laws. Two governments exist in America: that of the Union and that of the respective States. The Constitution of the United States was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States.[4] The constitution of a State is made by the people of that State for themselves only. Sovereignty in America has declared the Constitution of the United States the supreme law of the land, thus formally relegating State constitutions and laws to inferior rank,—that is, to a position of powerlessness when in conflict with the supreme law. Thus when we speak of two "sovereignties," or of "residuary sovereignty," we really mean "two governments of delegated powers,"—that is, the State governments and the national government. When we speak

[1] Discussed at length in the chapters on State Comity, and Commerce.

[2] Art. iv. (and preceding note).

[3] See also Chapters XII and XIII.

[4] Barron *v.* Baltimore, 7 Peters, 243 (1833).

of the two sovereignties, we do not mean *sovereignty* (which is by nature indivisible), but *government* (which is divisible), the creation of sovereignty and, unlike sovereignty, possesses only delegated powers.

10. For administrative purposes, or, stating the case in other words, for legal reasons and in harmony with precedents in law, the terms "sovereignty" and "residuary sovereignty" continue in use among lawyers, judges, political writers, and civil officials; but government is not, never was, and in such a country as ours, never can be sovereignty. American constitutional law is law made by authority of the sovereign people: the law of the United States is made by Congress, the authorized legislative agent of the people of the United States: the law of the State, is made by its Legislature, the authorized law-making agent of the people of the State. The same essential may be stated after the manner of Chief Justice Marshall as the law of the whole: the Nation; the law of the part, the State. Government is the child of sovereignty.

11. Because of the sovereignty of the people of the United States, and consequently, of the supremacy of the Constitution, several results follow:

Madison expresses one of these in *The Federalist*[1]:

> The idea of a national government involves in it not only an authority over the individual citizens, but an indefi-

[1] No. xxxix.

nite supremacy over all persons and things, so far as they are objects of lawful government.

Marshall expresses other results,—

The general government, though limited as to its objects, is supreme with respect to these objects. This principle is a part of the Constitution. To this supreme government ample powers are confided. With the ample powers confided to this supreme government are connected many express and important limitations on the sovereignty of the States.[1]

Hamilton, commenting on the Constitution, declares that "the national and State systems are to be regarded as one whole."[2] And finally, although our supreme law does not contain the word "sovereign," or "sovereignty," it implies sovereignty. The crowning illustration of this principle of implied sovereignty grew out of the acquisition of Louisiana in 1803. President Jefferson could find no provision of the Constitution specifically empowering the United States to make the acquisition, or to incorporate the region into the United States. He therefore proposed amending the Constitution so as to authorize the purchase. The President's doubts of the power of the United States to acquire Louisiana were weaker than his doubt of power to incorporate the province into the United States,—that is, to make

[1] Cohens *v.* Virginia, 6 Wheaton, 382 (1821). Madison's thought is incorporated into Weston *et al. v.* the City of Charleston, 2 Peters, 466 (1829.)

[2] *The Federalist*, No. lxxxii.

a foreign province or provinces inhabited, by an alien people, partakers in an American Commonwealth. He consulted his Cabinet. Levi Lincoln, the Attorney-General, was of opinion that to share the privileges and immunities of the people of the United States with a foreign population required the consent of the people of the United States, and he suggested that if a treaty of cession were made, containing such agreements, it should be put in the form of a change of boundaries instead of a cession, so as to bring the territory within the United States. Albert Gallatin, Secretary of Treasury, replied that to him it appeared: (1) That the United States as a nation have an inherent right to acquire territory; (2) That whenever that acquisition is by treaty, the same constituted authorities in which the treaty-making power is vested have a constitutional right to sanction the acquisition; and (3) That whenever the territory has become acquired, Congress have the power either of admitting it into the Union as a new State, or of annexing it to a State, with the consent of that State, or of making regulations for the government of such territory.[1] Thus, according to Gallatin, the United States, by its very nature, has the undoubted right to acquire, to hold, and to govern territory as a possession.[2] Twenty-five years after the purchase

[1] Gallatin's *Writings*, i., 11.

[2] Sustained by Downes *v.* Bidwell, 182 U. S., 244 (1901).

of Louisiana, Chief Justice Marshall handed down the decision of the Supreme Court, that "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or treaty."[1] In this decision, Marshall reasons as did Gallatin that a nation is by its very nature, sovereign. and possesses the powers and functions of sovereignty. When the American nation, a sovereign, created a government of delegated powers, under the Constitution, it delegated to that government powers adequate to its purposes as a nation.[2] The essential purpose of sovereignty is to continue sovereign. The word "sovereign" though not occurring in the Constitution is necessarily implied as a permanent quality or mark of the power that ordained and established the Constitution. Sovereignty cannot be delegated, but a supreme law, such as the Constitution, necessarily implies a sovereignty that has delegated the powers expressed or implied in the Constitution itself. In other words, the Constitution of the United States is the supreme law of the land because the people of the United States are a sover-

[1] The American Insurance Company *v.* Canter, 1 Peters, 511 (1828).

[2] Compare the Preamble. The entire discussion in *The Federalist* is of the conformity of the Constitution to a republican government and of the necessity of governmental powers adequate to governmental purposes.

eign. Sovereignty alone has original powers; all others are delegated. Thus the Constitution itself declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1]

12. American constitutional law is, therefore, the authoritative formulation, in constitutional, or statutory, or treaty form, of the will of the sovereign, the people of the United States. This formulation accords with the powers delegated by that sovereign. The expression of this delegation of powers in the conduct of the public business is government. Therefore in America, government is another word for the delegation of powers,—for limitations of authority. Sovereignty is unlimited; government is limited. The Constitution of the United States is the supreme law of the land because through it the people of the United States,—not the people of any particular State or group of States,—have delegated larger powers than have the people of any particular State through its constitution. The whole is greater than the part. "That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected."[2] The exercise

[1] Art. x.

[2] Marbury *v.* Madison, 1 Cranch, 176 (1803).

of this original right is an exercise of sovereignty. The result of this exercise, in America, is the Constitution of the United States which, this sovereignty declares to be "the supreme law of the land."[1]

[1] Every question in constitutional law, in the United States, sooner or later leads back to a question of sovereignty. What that sovereignty is can be known only by its operation,—that is, by political experience. What powers are delegated by the Constitution is the question answered (at least in part) by courts of law and legislatures, by publicists and by the actual administration of government. Widely divergent interpretations of that sovereignty and that law have been held throughout our history as a nation. These divergent opinions are recorded in the Debates during the formation and ratification of the Constitution; in the discussions incident to the Kentucky and Virginia Resolutions of 1798; in the discussions relating to Nullification, in 1833; again in 1860 and immediately prior; and in various decisions of the Supreme Court of the United States. Chief Justice Marshall's decisions (some thirty-six in number), the opinion of that Court in his time, remain the classic interpretation of national sovereignty. *The Federalist* remains the classic contemporaneous interpretation of the Constitution.

The issue involved is, fundamentally, one of *functions*, and is viewed at different times with different understandings. As a practical question, it is one of *jurisdiction* as legally understood, but as a question of *service* as politically understood. Here enter many and diverse factors as morals, industry, communal interest, public safety, social needs, and the like. Questions growing out of these are not and cannot be decided finally by any generation. Each generation interprets these factors. Thus constitutional interpretation becomes, not a fixed quantity, but an adjustment to reason and necessity. Prudence dictates that interpretation be conservative. The constitutional and political history of America must be read along with its constitutional law. In addition to cases already cited in this chapter, the following may advantageously be read, though each contains matter of special application to other aspects of the subject: *Ex parte* Siebold, 100 U. S., 371 (1879); The Civil Rights Cases, 109 U. S., 3 (1883); Rogers *v.* Alabama, 192 U. S., 226 (1904).

CHAPTER II

THE LAW OF LEGISLATIVE POWERS (I)

13. The organization of the government of the United States reflects the original and supreme will of the people as they have seen fit to assign to different departments of that government their respective powers. "The powers of the Legislature are defined and limited; and that these limits may not be mistaken, the Constitution is written."[1] Thus the Constitution declares that "all legislative powers *herein granted*" are vested in Congress.[2] The inevitable conclusion is "no grant, no power." Congress possesses only delegated powers. If an issue arises under an act of Congress, there must ever be the fundamental question of authority for the act. This question of authority once settled, the act, by the terms of the Constitution itself, is a part of the supreme law.[3] Rarely is an act of Congress declared unconstitutional. Legislative experience avoids the enactment of laws whose constitutionality is doubtful.

[1] Marbury *v.* Madison, 1 Cranch, 177. [2] Art. i., 1. [3] Art. vi., 2.

14. The general American doctrine is of the separation of delegated powers, and is commonly set forth in State constitutions.[1] Such separation of powers is not expressly declared in the Constitution of the United States; the principle here is of limitation no further than is necessary for the protection of each department of government. Fundamentally it is a question of functions. Whatsoever authority is necessary and proper for a department of government to exercise, belongs to that department. The separation of powers,—legislative, executive, judicial,—is a matter of agreement or convention made by the sovereign. Government is a *unit*, not a tripartite machine or device. But in order to administer government, and make it, as the business man would say, "a going concern," it is conceived and organized into departments. Sovereignty in America vests legislative power, so far as the people of the United States have delegated that power,—in Congress. The Constitution does not specify all the powers so delegated. Such specification is impossible. Such specification "could scarcely be embraced by the human mind"; its details "would partake of the prolixity of a legal code."[2] The practical procedure is followed in the Constitu-

[1] A typical formulation in Massachusetts, (1780) Pt. I., xxx. Discussed in Taylor *v.* Place, 4 R. I., 324 (1856.)

[2] McCulloch *v.* Maryland, 4 Wheaton, 316.

tion of selecting general—that is, large, comprehensive powers, or groups of powers, and authorizing Congress to exercise them. As a matter of practical government, had the American people chosen to declare in the Constitution that Congress shall have power to make all laws necessary and proper for the government of the United States, the grant would be essentially the same as that made by naming the powers of Congress in that instrument. The powers delegated to Congress are mentioned chiefly in the eighth section of the first article of the Constitution. In other parts of the same article other powers of Congress are declared, such as the power of each House over its members; to choose a presiding officer; the power of the Representatives to impeach; of the Senators to convict,—or try impeachments, and the respective powers of the Houses, under some circumstances, to elect a Vice-President, or a President, —and other powers, as of proposing amendments.[1]

15. The powers of Congress, delegated to it as a whole, or to its respective Houses, and largely regulative of congressional membership and procedure, may be described as necessary parliamentary powers, excepting the powers of the respective Houses in the selection of President and Vice-President. Parliamentary powers are functions essential to the efficiency of a legislative body, and they were worked

[1] Art. i., v.; Amendment XII.

out, largely, before and during colonial times. Such parliamentary functions were exercised by the British Parliament and by State Legislatures prior to the making of the Constitution. Indeed, the provisions respecting such powers, in the State constitutions from 1776 to 1787, were the immediate precedents for them in the Constitution of the United States.[1] But when we speak of the legislative powers vested in Congress, we do not mean, commonly, these strictly parliamentary powers; rather do we mean another group or class of powers included under such headings as "taxation," "money," "commerce," "banking," "the army," "the navy," "territory," and others of notable rank. Such powers as those indicate (or seem to indicate), a larger delegation of authority to Congress than its authority to regulate its membership. Whatever may be thought of the relative rank of the powers of Congress, all emanate from the same source, "the people of the United States."

16. In determining the nature and extent of these powers, we are aided by the Constitution itself which sets limitations. Thus,

all duties, imposts, and excises shall be uniform throughout the United States.[2] The privilege of the writ of *habeas*

[1] "The Sources and Authorship of the Constitution," in the author's *Constitutional History of the United States*, iii., 464–515.

[2] Art. i., 8: 1.

corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.[1] No bill of attainder or *ex post facto* law shall be passed.[2] No tax or duty shall be laid on articles exported from any State.[3] No preference shall be given by any regulation of commerce or revenue to the ports of one State over these of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.[4] No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.[5]

In addition to these limitations, there are limitations set forth in the first ten, in the thirteenth, fourteenth, and fifteenth amendments. These amendments, in the aggregate, deny to Congress authority to violate what we commonly designate as fundamental rights. In other words, the people of the United States have given Congress no power whatever to imperil these rights: they are excepted out of the government of the United States.[6]

17. In the several States a like limitation of the powers of the Legislature is made in the constitutions. A typical statement of this limitation may be found in the constitution of Pennsylvania, in the last clause of the Declaration of Rights:

[1] Art. i., 9: 2. [2] *Id.*, 3. [3] *Id.*, 5. [4] *Id.*, 6. [5] *Id.*, 7.
[6] See the Chapters on *The Law of Limitations*, and *The Law of Fundamental Rights.*

To guard against transgressions of the high powers which we ("the people of the Commonwealth") have delegated, we declare that everything in this article ("the Declaration of Rights") is excepted out of the general powers of government and shall forever remain inviolate.[1]

The discrimination here is between government and sovereignty by means of a clear limitation or denial of powers. Thus the carefully guarded fundamental rights are sovereign, not governmental rights. That the sovereign has the right or power to delegate any of these fundamental rights, or the control over them is a question in political science. That the sovereign, in the modern republic, has not so delegated them, is indisputable. Yet, in 1913 the people of the United States ratified the Sixteenth Amendment, namely, that "The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States and without regard to any census or enumeration."[2] This amendment more nearly identifies government with sovereignty than any other in the Constitution. It removes limitations on the power of Congress with respect to what is commonly called "direct taxation." It makes Congress practically sovereign in its power to impose such taxation and to collect such taxes. It does not require that direct

[1] *Pennsylvania*, 1873, Art. i., 26.
[2] Thus annulling Art. i., 2 : 3.

taxes, like indirect taxes, shall be "uniform throughout the United States." It is the first departure in America from the doctrine of limited government.[1]

18. Of the powers delegated to Congress by the American people it may be said that, save as excepted by the silence of the Constitution, or by positive limitation, they are universal and affirmative. Their extent as well as their nature are made known by interpretation,—that is, through the judiciary.[2] Judicial interpretation must be distinguished from economic, industrial, political, or even moral interpretation. The Constitution provides only for judicial interpretation.[3] The American people have vested legislative powers in Congress, and the exercise of them by Congress must be measured by the terms of the grant.[4] Thus far the supreme test of the constitutional exercise of these powers is to compare the particular act of Congress with the Constitution. Shall the act overrule the Constitution, or

[1] It will be profitable to compare this amendment with the doctrine laid down in Marbury *v.* Madison, 1 Cranch, 137. See also *The Reconciliation of Government and Liberty*, J. W. Burgess (1915).

[2] The fundamental principle of judicial interpretation is laid down in Marbury *v.* Madison; the principle is examined in the Chapter on *The Law of Judicial Power.*

[3] Art. iii.

[4] This point is elaborated and examined by the Supreme Court in the decision declaring the Civil Rights Bill of April 9, 1866, unconstitutional. Civil Rights Cases, 109 U. S., 3 (1883). The doctrine annunciated is that Congress has no power to legislate *generally* upon subjects, power over which is reserved to the States by the Tenth Amendment.

shall the Constitution overrule the act? This is the final test of congressional exercise of powers delegated; it is the essential measure of federal legislation. Practically it is congressional legislation which, sooner or later, brings out clearly,—or at least as clearly as the government of the United States can bring out,—the real nature of that government. Thus it is congressional legislation which, as tested in the courts of law, brings into view the implied and inherent powers of the federal government; the relations of that government with the States, and the powers of that government as to territories and outlying possessions.[1] So, too, it is congressional legislation that determines the objects and the extent of taxation, both direct and indirect; that regulates commerce, coins money, and fixes its value; affords equal protection to citizens, and applies the police power of the United States. It is congressional legislation which largely determines the jurisdiction of federal courts and assigns duties and powers to the President.[2] In brief, the legislative powers vested in Congress reflect the convictions of the people of the United States of the eighteenth century, when the trend of political thought was to dethrone kings and to enthrone legislatures, with

[1] See authorities at close of preceding Chapter; also Chapter XI.

[2] In this connection as to the President see Field *v.* Clark, 143 U. S., 649 (1892).

basic regard for individualism. A like tendency and regard are discernible in the State constitutions of that period. The American people did not create an omnipotent Congress, but they created a Congress having few limitations and these they practically nullified by the "sweeping clause" which empowers Congress "to make all laws which shall be necessary and proper for carrying into execution," the powers granted, "and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."[1]

19. The phrase "necessary and proper" practically includes all the purposes of government, and these the Constitution itself sets forth, as

To form a more perfect Union,
To establish justice,
To insure domestic tranquillity,
To provide for the common defense,
To promote the general welfare,
To secure the blessings of liberty

to themselves ("the people of the United States") and their posterity.[2]

This exercise of power by Congress is essentially *political*, and Congress alone is judge of "the choice of means and is empowered to use any means which

[1] Art. i., 8 : 18.

[2] Preamble. As to "necessary and proper," see United States *v.* Fisher, 2 Cranch, 396; McCulloch *v.* Maryland, 4 Wheaton, 421.

are in fact conducive to the exercise of a power granted by the Constitution."[1] This conclusion is inevitable. A legislative body could exist on no other principle. Thus it follows that necessity is supremacy, in the case of congressional legislation. To any understanding of American constitutional law, comprehension of this principle is fundamental.

20. May Congress abuse its powers? Possibly. The remedy is through popular election of members of either House, and repeal of the laws which—even though their constitutionality be sustained by the courts, may, in the judgment of the people, transcend limits popularly supposed to be placed on Congress. Thus there are two checks on congressional legislation: the courts of law and the votes of the people. It follows that the American sovereign—the people—may by their votes approve or condemn congressional legislation—approval or condemnation resulting in a continuance or a change of membership of Congress, in conformity to the relative strength of political parties. It is here that part of the unwritten constitution is disclosed. The written Constitution contains no reference to political parties, but actual government in the United States is by and through political parties who, as organized agencies of the public mind, give expression, in large measure, to the unwritten constitution. Interpretation of the Con-

[1] U. S. *v.* Fisher, *supra.*

stitution, and of course, of the powers of Congress, is largely interpretation by political parties.

21. Two interpretations of the Constitution have evolved in America, the strict, or literal, commonly called the Jeffersonian, and the liberal, or interpretation according to the spirit of the Constitution, commonly called the Hamiltonian. Chief Justice Marshall was a disciple of Hamilton and enthroned his ideas in the decisions of the Supreme Court for thirty years, and these the first thirty years of the existence of the Court. Later judges, whatever their politics, have rarely departed from the course of interpretation laid down by Marshall. To what extent the political convictions of a judge determine his judicial decisions, and to what extent party doctrines find utterance in the decisions of courts of law are matters of opinion quite as diverse as the men who hold them. Yet, in order to understand American constitutional law it is necessary also to be familiar with American political and constitutional history. Without that history, that law lacks background and circumstance.[1]

22. In attempting, then, to understand the legislation of Congress, which is an exercise of delegated powers, it is also necessary to know the history of the times in which it was enacted. Thus the first ten

[1] The great opinions interpretative of the Constitution have each their historical setting. Illustration of this is given in the annotated editions of Marshall's decisions, *e. g.*, J. P. Cotton's edition, 2 vols. 1905.

amendments were added in response to a quite unanimous demand of the American people for what they considered at the time, 1789, an adequate protection of their fundamental rights. The Eleventh Amendment of 1798 grew out of the unwillingness of the people that a State should be made defendant in a federal court at the suit of a citizen of another State; therefore federal jurisdiction in such cases was denied. The Twelfth Amendment of 1804 was added to remedy a defect in the Constitution in the method and procedure of choosing the President and the Vice-President. The Thirteenth, Fourteenth, and Fifteenth Amendments, of 1865, 1868, and 1870, were added because of the negro race. The Sixteenth and Seventeenth Amendments, of 1913, were added after long agitation over direct taxation and the popular election of senators of the United States, the one essentially an economic, the other, a political question. The history of the times records how these amendments were brought about. So too does that history largely explain the legislation enacted by Congress by authority of these amendments.[1]

23. The essential fact as to the powers of Congress

[1] For a detailed history of the first fifteen amendments see the author's *Constitutional History of the United States;* the social and political history from 1789 to 1870 are related, respectively, by John Bach McMaster in his *History of the People of the United States*, and by James Schouler in his *History of the United States.* J. F. Rhodes in his *History of the United States from the Compromise of 1850*, 7 vols. (1850–1877), gives the history of congressional

is of their limitation. Turning to the Constitution itself, one will find that it devotes nearly three times as much matter to legislative as to executive power; and nearly eight times as much matter to legislative as to judicial power. Doubtless this spatial distribution of powers (or limitation of powers) tells the whole story. Government is largely an affair of legislation. Essentially, government is the public business, controlled and administered for public or general purposes. Government, in a republic, may be said to express itself in laws. So important is this expression of the will of the sovereign, constitutional law consists almost wholly of the interpretation of legislation. This means that the principles of government are to be learned chiefly from the judicial decisions in particular cases; and this again means that the particular law having in due course come before the tribunal, that law, when tested by the supreme law of the land is sustained, or is declared to be without authority, —hence it is unconstitutional. In the final test, all legislation of Congress must stand the strain of this question: By what authority is this law made? We come then, sooner or later, in congressional legislation, to the supreme law of the land and to sovereignty in America,—"We, the people of the United States."

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legislation and of judicial interpretation during the period. Much of the history relevant to the great decisions of the Court is given in the decisions.

24. It is a presumption of law, necessary in the conduct of government, that all acts of Congress are constitutional until pronounced unconstitutional by a competent judicial tribunal. An issue arising between parties involves a law. In deciding the issue the tribunal decides as to the constitutionality of the law, provided its constitutionality forms part of the issue. Unless the issue of the constitutionality arises and is before the tribunal, that body can make no decision respecting the constitutionality of the law. Thus whether or not the powers exercised by Congress, as expressed in a piece of legislation—exceed the powers granted to it by the Constitution is a question which Congress itself is powerless to decide. The Constitution itself does not so declare; on the other hand it does not provide that Congress shall be the final judge of its own powers. The principle regulative of the exercise by Congress of powers delegated to it is laid down by the Supreme Court:[1] "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appro-

[1] McCulloch *v.* Maryland, 4 Wheaton, 316 (1819). Many later decisions apply this principle.

For an examination of the character and scope of the Legislative Department, see

Taylor *v.* Place, 4 R. I., 324 (1856); Dalby *v.* Wolf, 14 Iowa, 228 (1862); Stone *v.* City of Charleston, 114 Mass., 214 (1873); Barrno *v.* Baltimore, 7 Peters, 243 (1833); Calder *v.* Bull, 3 Dallas, 386 (1798).

The powers of Congress over taxation, commerce, the currency,

priate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

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war, territories, outlying possessions, etc., are particularly examined under appropriate headings in later chapters.

In addition to cases cited in the present Chapter, and to the above, and relating to the powers of Congress, see Gibbons *v.* Ogden, 9 Wheaton, 1 (1824); The Mayor, etc., of the City of New York *v.* Miln, 11 Peters, 102 (1837); The License Cases, 5 Howard, 504 (1847); Sinnot *v.* Davenport, 22 Howard, 227 (1859); Gilman *v.* Philadelphia, 3 Wallace, 713 (1865); Henderson *et al.* Mayor of the City of New York, *et al.* Commissioners of Immigration *v.* North German Lloyd, 92 U. S., 259 (1875); Hull *v.* De Cuir, 95 U. S., 485 (1877); Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1 (1877); County of Mobile *v.* Kimball, 102 U. S., 691 (1880); Williamette Iron Bridge Co. *v.* Hatch, 125 U. S., 1 (1888).

The best brief treatise on the legislative in America is *American Legislatures and Legislative Methods*, by Paul S. Reinsch, 1907; the most exhaustive and authoritative treatise is *Constitutional Limitations*, by Thomas M. Cooley. The general powers of Congress are discussed by Justice Story in his *Commentaries on the Constitution*, and by Chancellor Kent in his *Commentaries on American Law*.

See also the authorities cited in the present work on *The Law of the Judicial Power*.

CHAPTER III

THE LAW OF LEGISLATIVE POWERS (II)

25. The powers of Congress, whether expressed or implied, are powers incident to sovereignty, being essential to the existence of the government which sovereignty has created. The principle is laid down in *The Federalist*, that the government of the Union "must possess all the means and have a right to resort to all the methods of executing the powers with which it is intrusted."[1] The immediate comparison here is between the government of the United States and those of the States. The federal government must possess powers as adequate for its purposes as are the powers possessed and exercised by the particular States. The principle is laid down by Hamilton yet more explicitly:

> A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other

[1] No. xvi.

control but a regard for the public good and to the sense of the people.[1]

This principle applies to both American governments,—that of each State, and that of the United States. Each within its own jurisdiction is supreme. This means that the national government possesses powers adequate to the existence and efficient operation of such a government. With this principle in mind, the exercise, by Congress, of its powers becomes reasonably plain. The people of the United States are a sovereignty; they have ordained and established the Constitution of the United States. This Constitution is a plan of republican, that is of representative, government. The powers granted by this sovereignty to this government are adequate to the ends and purposes of this government. Whence follows all our constitutional law: for the constitutional law of the States cannot vary essentially from that of the United States. The principle here is stated by Chief Justice Marshall: "The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."[2]

26. The powers of Congress are derived through this Constitution and are adequate to the legislative needs of the government thus created. Here again

[1] No. xxxi.

[2] McCulloch *v.* Maryland, 4 Wheaton, 316 (1819).

applies the principle as to proper legislative powers: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." If this principle be true (and it lies at the basis of government in America), it seems unnecessary that the Constitution should specify, or enumerate the powers of Congress. These which are enumerated may not be said to be in any logical order. Doubtless the qualities of sovereignty are equal qualities—each essential to the supreme end and purpose of sovereignty—which end and purpose is to be and to remain sovereignty.

27. But to Congress and to the State Legislatures powers are granted. Does the grant of powers to Congress extinguish the grant to the State Legislatures? Here, again, Hamilton states the principle:

> An entire consolidation of the States into one complete sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the Convention ("of 1787") aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather, this alienation, of State sovereignty,

would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.[1]

The implication of the extinguishment of the powers of the State Legislature by the powers of Congress can arise only where exercise of State authority is "absolutely and totally contradictory and repugnant to the power delegated to Congress."[2] Therefore "where the authority of the States is taken away by *implication*, they may continue to act until the United States exercise their power, because until such exercise there can be no incompatibility."[3] The principle here laid down is illustrated by laws fixing the standard of weights and measures; bankruptcies; counterfeiting the coin and securities of the United States; copyrights and patent rights. If Congress legislates on these subjects, such legislation excludes State legislation in conflict with it. In the absence of congressional and in the presence of State legislation, on these (and some other subjects

[1] *The Federalist*, xxxii.

[2] *Idem* and Weaver *v.* Fegely, 29 Pennsylvania State, 27 (1857).

[3] Moore *v.* Houston, 3 S. and R. (Pa.), 179, and the cases cited in Weaver *v.* Fegely.

falling in the same class) the respective State legislation is supreme within the jurisdiction of the State.[1] Stated in a different way, this principle of American constitutional law would read,—the mere grant to the federal government of power over a subject does not necessarily extinguish State authority over the same subject. Thus the State has power by common law, or by statute, to fix a standard of weights and measures. The issue here is not one merely of authority but of relative authority. The exercise of authority by Congress is not, by that fact, prohibition of exercise of authority by a State. This exercise is radically different from that of legislation on coining money, making treaties, granting titles of nobility, issuing letters of marque and reprisal,—or any other subject over which Congress has exclusive, and a State no jurisdiction. Here the question is one of exclusive, or sole authority. Thus, State Legislatures have authority to pass bankrupt or insolvent laws, provided there is no act of Congress, on the subject, in force establishing a uniform system of bankruptcy conflicting with the State law, and, further, providing that the State law does not impair the obligation of contracts.[2]

28. But State insolvent laws apply to contracts within the State between one of its citizens and a

[1] See cases as under preceding note.

[2] Baldwin *v.* Hale, 1 Wallace, 223 (1863).

citizen of another State, and they do not apply to contracts not made within the State. The principle here is one of jurisdiction: no State has authority outside its own jurisdiction. Therefore interstate matters are beyond State jurisdiction and are exclusively under the control of Congress. This principle is expressed judicially: "Insolvent laws of one State cannot discharge the contracts of citizens of other States because they have no extra-territorial operation."[1]

29. Congress exercises any of its powers as an agent of its sovereign, the people of the United States. These powers, like those of the President, or of the federal courts, are expressed or implied; the government of the United States is "a national government with sovereign powers, legislative, executive, and judicial."[2] Because this government is a sovereign government it possesses the choice of means to make its sovereignty real. Hence it possesses power to pay the debts of the United States, to borrow money, to incorporate banks, to coin money, to make war, and to do whatever acts it considers necessary and proper, and in such manner as it sees fit,—all acts of sovereignty. It alone can determine what is a legal tender, what the value of coins, domestic or foreign (within its

[1] Baldwin *v.* Hale, *supra.*

[2] Juilliard *v.* Greenman, 110 U. S., 421 (1884), citing and quoting McCulloch *v.* Maryland.

jurisdiction) and, in brief it can do all acts such "as accord with the usage of sovereign governments." Thus the national currency may be coin or paper, as Congress shall regulate. Whatsoever Congress by legislation declares to be a legal tender in payment of debts between individuals or corporations is thereby a legal tender, because Congress is "the legislature of a sovereign nation" and is expressly empowered by the Constitution to enact laws of the kind.[1] This power is commensurate with the jurisdiction of Congress in this matter,—a power which absolutely and totally excludes the power of the several States.

30. As a matter of constitutional law, it must be admitted that, granting the national sovereignty of the people of the United States, it must follow that the legislature of this sovereign nation would possess such power over currency and coinage. That is, the power would be *implied* if it were not expressed. It is the office or function of a supreme national government to legislate for national ends and purposes.[2]

But the principle of national sovereignty which operates in Congressional legislation on money, currency, coinage, and legal tenders, does not nullify

[1] Art. i., 8 : 1, 2, 5.

[2] Distinctions as to United States notes, coin, currency, legal tender, etc., are brought out in Juilliard *v.* Greenman, *supra;* Hepburn *v.* Griswold, 8 Wallace, 603 (1869); Parker *v.* Davis, 12 Wallace, 79 (1871); Trebilcock *v.* Wilson, 12 Wallace, 687 (1871).

the principle of contracts. A lawful contract between parties that calls for payment of a particular article with a particular article, be it silver coin, gold coin, national bank notes, treasury notes, reserve bank issues, or subsidiary coin, is satisfied only when executed in the terms of the contract. The obligation of the contract would be impaired if it were executed otherwise than as the contract itself sets forth.[1]

31. Congress is not under contract to coin money, to pay the debts of the United States, or to borrow money in any particular way. Duties, excises, and imports must be *uniform* throughout the United States, and this condition is a fundamental limitation. No limitation is placed by the Constitution on the power of Congress over the currency. This power is supreme. It is a power which, duly exercised, secures the existence of sovereignty itself.[2]

[1] Knox *v.* Lee, Parker *v.* Davis, 12 Wallace, 554 (1871).

[2] An account of the struggles of political parties, and of the successive decisions of the Supreme Court as to Legal Tender Acts belongs to the history of the law rather than to a statement of the essentials of present constitutional law. Accounts of this struggle, available in histories of the United States, may be compared with Justice Stephen J. Field's account in J. Norton Pomeroy's *Some Account of the Work of Stephen J. Field as a Legislator, State Judge, and Justice of the Supreme Court of the United States* (1881), (Edition by George C. Gorham, 1895) pp. 65–86. Mr. Justice Field's dissenting opinions from the decisions of the Supreme Court which sustain the constitutionality of the Acts are based largely on his conception of the principle of the obligation of a contract as contained in the Constitution respecting "gold and silver coin." For the history of

A function of sovereignty is performed in the issuing of a bill of credit, the sovereign power thus pledging its faith, and the thing issued is designed to circulate as money. The State, or Commonwealth, in the Union, is not a sovereign for this purpose, as the Constitution provides.[1] So when a State incorporates a bank, which issues bills of credit, the act of the bank is not an act of sovereignty, and the State, though a stockholder in the bank, imparts none of its sovereignty to the bank. The bank as a corporation, not the State as an incorporator, is answerable for the obligations of the bank.[2] To constitute a "bill of credit," in the meaning of the Constitution, it must be issued by a State, on the faith of the State and be designed to circulate as money.[3]

32. Power to provide for the punishment of counterfeiting the securities and current coin of the United States is specially delegated to Congress,[4] but it is not denied to the several States. The power to coin money belongs exclusively to Congress[5] as a mark and necessary incident of sovereignty, but

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the Acts, the decision of the Court invalidating them (1869); the increase of the membership of the Court (1870); the reversal of the earlier decisions (1871), and the final decision in Juilliard *v.* Greenman (1883), consult Rhodes, vi., 268, 270–273, and Note.

[1] Art. i., 10 : 1.

[2] Briscoe *v.* Bank of Kentucky, 11 Peters, 257 (1837).

[3] Darrington *v.* The Bank of Alabama, 13; Howard, 12 Briscoe *v.* Bank of Kentucky, *supra.*

[4] Art. i., 8 : 6.

[5] *Id.* 5, 10: 1.

counterfeiting the coin constitutes an offense against both the State and the United States. The uttering of counterfeit coin is a cheat, and the State can protect its citizens against fraud by exercise of its police power. Such offenses fall strictly within State jurisdiction. Counterfeiting debases the coin, throws spurious and base metal, or false securities into circulation, and is an offense against that constitutional power which is exclusively authorized to create a currency for public uses. The offense is against the sovereignty of the nation, and, being a fraud, it is against the sovereignty of the State. In either case it imperils sovereignty.[1]

33. The power of Congress to establish post offices and post roads is not an exclusive power, for the States are not prohibited to legislate on the same subject. But Congress has unlimited power over it and may designate what may be included in and what may be excluded from the mails. This exercise is doubtless of the police power. It does not follow that congressional establishing and regulation of post offices and post roads mean that Congress has power to deal with crime or immorality within a State in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime and immorality. So a postal law of

[1] United States *v.* Marigold, 9 Howard, 560 (1849); Fox *v.* Ohio, 5 Howard, 410.

Congress excluding lottery tickets from the mail is not an abridgment of the freedom of the press. Congress, by reason of the nature of its functions, is empowered to determine what shall and what shall not be carried in the mails, and the right of freedom of speech does not give the right to injure the objects or to defeat the purposes which government is ordained and established to further and protect.[1] But the State, in exercise of its police power, may undoubtedly protect its citizens from injury springing out of that intercourse known as the mail service so long as it is wholly intrastate,—that is, within its jurisdiction.

34. Copyrights and patent rights are privileges granted by Congress for a term of years and are strictly statutory—for the United States has no common law. The States may exercise their powers in like manner, subject to the essential condition that the Constitution is the supreme law of the land. Copyrights and patent rights are examples of rights which exist by act of Congress,[2] but the right thus created does not annul the ordinary police power as put forth in the police regulations of a State. The person owning or controlling either copyright or patent right is not thereby empowered to defy the laws of a State as respecting the sale of the article in

[1] *In re* Rapier, 143 U. S., 110 (1892); Battle *v.* U. S., 209 U. S., 36.
[2] Wheaton *v.* Peters, 8 Peters, 591 (1834).

which or over which he has the exclusive right. The article itself may be adjudged injurious to the public and, therefore, by police regulation, forbidden to be sold or to be exposed for sale in the State. The patent right prevents others than the inventor from participating in the fruits of his invention, without his consent; but the exercise of the right must be in subordination to the police regulations of the State, otherwise, "a person might with as much propriety claim a right to commit murder with an instrument, because he held a patent for a new and useful invention."[1] It may be accepted as a principle that "patent laws do not interfere with the power of a State to pass laws for the protection and security of its citizens, in their persons and property, or in respect to matters of internal polity, although such laws may incidentally affect the profitable use or sale by a patentee of his inventions."[2]

35. The power of Congress, expressly delegated to it, "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," is not exclusive. The States are not

[1] Vanini *et al. v.* Paine *et al.* 1 Harr. (Del.) 65, quoted in Patterson *v.* Kentucky, 97 U. S., 501 (1878).

[2] *Id.* See also Herdic *v.* Roessler, 109 New York, 127 (1888); Hill and Co. Lmtd. *v.* Hoover, 220 U. S., 329. "Where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract and not under the patent laws." Hartell *v.* Tilghman, 99 U. S., 558. See also Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S., 46 (1888).

prohibited from legislating on the subject. Offenses committed within the jurisdiction of a State are punishable by State laws. Such offenses are punishable by common law. If there is no act of Congress covering the offense, then the United States has not assumed jurisdiction. But absence of a specific mention or definition of the offense does not invalidate a claim of jurisdiction when the result of the offense is piracy. Piracy is robbery committed within the jurisdiction of the admiralty,[1] but an offense that effects piracy, though not technically robbery, is piracy.[2] As piracy is an offence against the law of nations, and not strictly against domestic municipal law, it falls within the jurisdiction of the admiralty—a jurisdiction over which the judicial power of the United States is expressly extended by the Constitution.[3] This jurisdiction is not exclusive as provided for by the Constitution. Practically, however, the States do not legislate on the subject, unless it be to provide for the execution of their police power over their own waters.

36. The "admiralty jurisdiction" of the United States is co-extensive with its authority over or on waters, fresh or salt, including the high seas, the Great Lakes, and rivers and streams commerce over which it has power to regulate. Thus this jurisdic-

[1] Rex *v.* Dawson, 5 State Trials.
[2] U. S. *v.* Smith, 5 Wheaton, 153 (1820).
[3] Art. iii., 2: 1.

tion is over the American ship wherever it may be. "Offenses committed on vessels belonging to citizens of the United States, within their admiralty jurisdiction ('that is within navigable waters') though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction."[1]

37. The war power is possessed by Congress exclusively,[2] for the limitation of the States as to declaring war can be construed only as an exclusive delegation of this power to the United States. The exercise of this power is a sovereign act and may consist in a formal declaration of war, or a formal recognition or declaration of a state of war. War existing by such regulation, the President, as commander-in-chief of the army and navy, and of the militia of the several States when called into the actual service of the United States, is bound by his oath faithfully to execute his office—which is to execute the laws of the United States. It is for the President to determine how to execute his office; that is a political, not a judicial question. "He must determine what degree of force the crisis demands." He must decide the character of the opposing forces, whether they are belligerents, or of some other character. He may close ports or declare a blockade of the enemy. He

[1] U. S. *v.* Rodgers, 150 U. S., 249 (1893).
[2] Art. i., 8 : 11; The Prize Cases, 2 Black, 635 (1862).

possesses the whole executive power of the United States. Ratification of his acts though *ex post facto* are constitutional,—fundamentally because sovereignty having vested the executive office in a President, and he having performed its duties to the best of his ability, refusal to consider his acts as constitutional would be repudiation by sovereignty of an act which had been done by its authority.[1]

38. The word "State" in the Constitution refers to a State of the Union.[2] For while the Constitution was made, "ordained and established by the people of the United States for themselves,"[3] it was made for the people of the United States in States. Thus it follows that over a domain not constituting a State, that is, over a domain consisting of a ceded district, or a territory, or an outlying possession, Congress has sole jurisdiction. Only the United States and the several States possess sovereignty. No State, or a member of the Union, has jurisdiction over the district and there is no other American government than Congress to exercise it. "Territory" like property by common law must have an owner; if it is self-owned and self-governed, it is sovereign; otherwise it is a subject or possession of sovereignty.

[1] Brown *v.* U. S., 8 Cranch, 110; American Insurance Co. *v.* Canter, 1 Peters, 511; Lamar *ex. v.* Browne *et al.*, 92 U. S., 187; Mormon Church *v.* U. S., 136 U. S., 1.

[2] Hepburn *v.* Ellzey, 2 Cranch, 445 (1804).

[3] Barron *v.* Baltimore, 7 Peters, 243 (1833).

It follows, as to American constitutional law, that subdivisions of States are wholly within State jurisdiction: Congress having no jurisdiction over counties or cities other than as, in a general way over matters, Congressional legislation affects counties and cities as parts of States throughout the United States.[1] And unless a State has ceded its jurisdiction over a district within its borders, it has full authority to levy taxes, to execute its inspection and other police laws and regulations within that district. Thus Kansas ceded the Ft. Leavenworth Military Reservation to the United States in 1875, but the deed of cession granted no more than use of the land as a military post; the State, therefore, could levy and collect taxes within this area, having never parted with the sovereign right to do so.[2] And any other powers or rights of the State, over this area, not explicitly granted to the United States by Kansas in the deed of cession remain intact in the State; its original jurisdiction as a State, save as explicitly modified by that deed, remains.

39. The power of Congress to govern territory, implied in the right to acquire it, and given to Congress in the Constitution,[3] to whatever other limitation it may be subject, the extent of which must be decided as questions

[1] Metropolitan R. R. Co. *v.* District of Columbia, 132 U. S., 1 (1889).

[2] Ft. Leavenworth R. R. Co, *v.* Lowe, 114 U. S., 525 (1885).

[3] Art. iv., 3.

arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated.[1]

The principle laid down by the Supreme Court recognizes two kinds or classes of ceded territory: one, "made a part of the United States by congressional action," that is, incorporated into the United States; the other, unincorporated. While congressional authority over either class is supreme, when the Constitution and laws of the United States are extended by Congress over a territory, they cannot be withdrawn,[2] for if the Constitution could be withdrawn directly it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such and would become of no greater authority than an ordinary act of Congress.[3] The decision of the Court as to the power of Congress over territory of the United States makes Congress absolute in the exercise of its power. The Court does enumerate the limitations on Congress, in such control, but leaves each limitation to be determined as

[1] Dorr *v.* U. S., 195 U. S., 138 (1904); Hawaii *v.* Mankichi, 190 U. S., 197 (1903); Dooley *v.* U. S., 183 U. S., 151 (1901) Downes *v.* Bidwell, 182 U. S. (1901); Rasmussen *v.* U. S., 197 U. S., Weems *v.* U. S., 217 U. S., 349. (But see dissenting opinions in above cases.)

[2] Downes *v.* Bidwell, *supra*, and cases and laws therein cited and quoted.

[3] *Idem.*

the issue involving it shall arise.[1] The safeguard against congressional absolutism is thus expressed by the Court:

There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect, or to secure dependencies against legislation manifestly hostile to their real interests.[2]

[1] There are powerful dissenting opinions in the various Insular Cases. The chief objection to the unlimited control of insular territory by Congress is that Congress itself, by the Constitution, possesses only limited powers. How can a limited Congress exercise unlimited powers?

[2] Downes *v.* Bidwell, *supra.* (The Court cites, in confirmation, the history of Congress and of the British Parliament.)

CHAPTER IV

THE LAW OF TAXATION

40. In our system of government [observes the Supreme Court], it is oftentimes difficult to fix the true boundary between the two systems, State and federal [and, adopting the words of Chief Justice Marshall, proceeds],—endeavoring to fix this boundary upon the subject of taxation, if we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government,—we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all these powers which are conferred by the people of the United States on the government of the Union, and all these means which are given for the purpose of carrying these powers into execution. We have a principle which is safe for the States and safe for the Union.[1] We are relieved, as we ought to be, from clashing sovereignty.

[1] Bank of Commerce *v.* New York City, 2 Black, 620 (1862) quoting from McCulloch *v.* Maryland, 4 Wheaton, 431 (1819). The principle is laid down in the decision that "the sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but it does not extend to these means

It follows that the powers and functions of the two governments can be harmonized "only by a wise and forbearing application of this principle."[1]

41. A tax is a burden or charge imposed by the legislature on property or persons to raise money for public purposes.[2] The two essentials of a good tax are that it is to be laid for a public purpose and by authority. The exercise of the taxing power not only distinguishes sovereignty but also the government which sovereignty creates by delegation of power. But the State cannot exercise taxing power beyond its jurisdiction,[3] a limitation parallel to the limitation of the sovereignty of the State, that is, a version (however unphilosophical) of the idea in the

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which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." *Id.* 429.

[1] Bank of Commerce *v.* New York City, *supra.*

[2] Loan Association *v.* Topeka, 20 Wallace, 655 (1874), quoting Cooley on *Constitutional Limitations*, 479.

[3] P. R. Co. *v.* Pennsylvania, 15 Wallace, 300 (1872). The constitutional use of the taxing power by the United States and by the several States is examined by Hamilton in *The Federalist*, No. xxxii., —the classic contemporaneous exposition of the taxing clauses of the Constitution. For a judicial examination of these clauses see Transportation Company *v.* Wheeling, 99 U. S., 273 (1878). The idea held both by Hamilton and by the Court is that taxation is the exercise of sovereign power; that "all subjects over which the sovereign power of a State extends are objects of taxation," but that "objects over which it does not extend, as for example, the means and instruments of the general government, are exempt from taxation." (The quotation in Transportation Co. *v.* Wheeling, from McCulloch *v.* Maryland is not verbally accurate.)

phrase "residuary sovereignty."[1] But unless restrained by the federal Constitution the power of Congress as to mode, form, or extent of taxation is unlimited.

The test here is jurisdiction.[2] Taxation is the correlative of protection. As the State cannot protect so it cannot tax beyond its jurisdiction.[3] Thus the person or the property must be within the jurisdiction of the State to bring either within its taxing power. Tax laws can have no extra-territorial operation,[4] but there is no established limit of the taxing power or to the selection of objects to which it is applicable.[5]

42. A State Legislature may abuse this power, but the Constitution of the United States was not intended to furnish a corrective for every abuse of power committed by the State governments. Relief lies wholly with the electors within the State who, if the State constitution does not afford security against unjust taxation and unwise legislation, can both alter the State constitution and elect other legislators.

So long as the State by its laws, prescribing the mode and

[1] The phrase (*Federalist*, No. lxii.) may be Hamilton's or Madison's.

[2] P. R. Co., *v.* Pennsylvania, 15 Wallace, 300.

[3] This principle applies also in international law.

[4] The principle is established in McCulloch *v.* Maryland.

[5] Kirtland *v.* Hotchkiss, 100 U. S., 491 (1879).

subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured by the Constitution of the United States, the (Supreme) Court, as between the State and its citizens, can afford no relief against State taxation, however unjust, oppressive, or onerous.

The discretion of the State,—that is, of the State Legislature, is beyond the power of the federal government, or any of its departments, to supervise or control.[1]

43. The fundamental idea in America is that each government—the State, the national—possesses powers and functions adequate to its own ends and purposes. Thus the State has no power to lay a tax on any constitutional means employed by the government of the Union to execute its powers, otherwise, by taxation of such means or agencies,—say the mail, the mint, judicial process, patent rights,—the States might defeat all the ends of the national government,—a design not intended by the people of the United States.[2] But this protection of government is not limited to the United States by limiting the

[1] Kirtland *v.* Hotchkiss, *supra.* Thus, "If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation." Savings and Loan Society *v.* Multnomah County, 169 U. S., 421 (1898).

[2] McCulloch *v.* Maryland, *supra*, quoted in The Collector *v.* Day, 11 Wallace, 113 (1870).

States; it applies to the States as limiting the United States.

The sovereign powers vested in the State governments by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States.[1] As the powers not delegated were reserved to the States respectively, or to the people, the government of the United States can claim no powers not so delegated, and the powers actually granted must be such as are expressly given, or given by necessary implication.

In our complex system, the existence of the States in their separate and independent condition is so indispensable, that without them the general government itself would disappear from the family of nations.[2] Whence the necessary conclusion that the means and instrumentalities employed for carrying on the operations of their governments (the State governments), for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax, and more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointing of officers to

[1] The Collector *v.* Day, *supra.* (The Court quotes the Tenth Amendment, in this connection, as the basis of its decision.)

[2] *Idem.*

administer the laws. Without this power and the exercise of it, no one of the States, under the form of government guaranteed by the Constitution, could long preserve its existence.[1]

44. One of the reserved powers of the States was to establish a judicial department.

All of the thirteen States were in possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is therefore one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States. In respect to reserved powers, the State is as sovereign and as independent as the general government.[2]

The means and instrumentalities employed by the one government to carry its powers into operation are as necessary to its self-preservation as the means and instrumentalities are necessary to the other. Unimpaired existence is as essential to the one as to the other. There is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, or prohibiting such taxation.

In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation;

[1] The Collector *v.* Day, *supra.* [2] *Id.*

as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.[1]

45. This was the constitutional law of the United States as settled in 1870,[2] the case arising in Massachusetts; the plaintiff a judicial officer of that Commonwealth having brought suit to recover from the United States Revenue Collector the amount of income tax exacted from him, it being part of his salary as a judge in that Commonwealth. The Supreme Court of the United States sustained the plaintiff for reasons given in the opinion, part of which has been quoted. By parity of reasoning, as followed in that decision, any act of Congress imposing a tax on the salary of any State officer, if his office is a means and instrumentality employed by the State to carry its powers into operation must be declared unconstitutional. In 1913 the Constitution was amended so that "The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[3]

Does this amendment increase the taxing power of Congress beyond that power as possessed prior to 1913 and as limited by the Supreme Court in its

[1] The Collector *v.* Day, *supra.* [2] *Id.* [3] Amendment XVI.

decision in the case of The Collector *v.* Day? If any officer of a State, executive, legislative, judicial, or administrative, receives a salary, large or small, (and it forms part of his income) is it beyond the jurisdiction of the United States as a taxable estate, despite the explicit power of Congress, in this Sixteenth Amendment "to lay and collect taxes on incomes, from whatever source derived?" Does the amendment overrule the decision in The Collector *v.* Day?[1] Evidently the amendment empowers Congress to levy an income tax wholly in disregard of the effect of the tax in impairing the "necessary means and instrumentalities of a State." Here too the issue is one of jurisdiction. The person taxed being within the jurisdiction of the United States has no redress against that jurisdiction more than has a person, taxed and being within the jurisdiction of a State, redress against the State. But can the Commonwealth of Massachusetts, or any other State, imposing an income tax, lay and collect it from whatever source derived, and that source be the treasury of the United States,—that income be salary received by a citizen of the State who also is a federal official, say a federal Judge, or a Collector of the Revenue, or a United States Marshal, or a Senator of the United

[1] Compare the effect of the Thirteenth Amendment, the Fourteenth and Fifteenth Amendments on the decision of the Supreme Court in Scott *v.* Sandford, 19 Howard, 393 (1857).

States, or a Congressman, or the President of the United States?[1]

46. In the operations of government, the delegation of authority by the executive, the legislative, or the judiciary is rare. The constitutional test, in either case, is purpose and authority. Thus a municipal corporation is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. "The action is no less a portion of the sovereign authority when it is done through the agency of a town or city corporation."[2] Thus a tax authorized by the State Legislature, to be imposed by a municipal corporation is a good tax in law, provided it is for a public purpose. This is not a delegation of the taxing power, but is the exercise of it by the Legislature. The municipality itself has no power to tax,

[1] To what extent a salaried official of a State is exempt from inclusion of his salary as income taxable under the Sixteenth Amendment is as yet not determined by judicial decision. "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principle so often announced by the courts, and especially by this court (the Supreme Court of the United States) that it may be received as an axiom of our constitutional jurisprudence." Philadelphia and Southern Steamship Company *v.* Pennsylvania, 122 U. S., 326 (1887).

[2] United States *v.* R. R. Co., 17 Wallace, 322 (1873).

or even to be a municipality, save by authority of the State, usually by the constitution, vested in its Legislature. The amount of the tax, the subjects of taxation, the method of assessment and of collection are wholly within the discretion of the Legislature. The exemption of churches, schools, colleges, and charitable institutions may or may not be required by a State constitution. If this is silent on the subject, the question is wholly one of legislative discretion. A charitable institution has no fundamental right to exemption from taxation, as a person has a fundamental right to "due process of law."[1] The principle of exemption from taxation is that taxation of the person or the property tends to destroy the powers or to impair the efficiency of the State.[2]

47. A tax must not only be laid by authority but it must be for a public purpose. Thus any assessment imposed upon persons or property by the government, State or federal, for the gain, emolument, or advantage of a private person, or an official, is un-

[1] See the Chapter on *The Law of Fundamental Rights, post.*

[2] Wisconsin Central R. R. Co. *v.* Price County, 133 U. S., 496 (1890). As to exemptions, the decisions are conflicting. Not infrequently notices may be seen of exemption of manufacturing plants, or other industrials, from taxation, if they locate within a community. Mississippi in its constitution of 1890 made such exemptions by special ordinance. Such exemption has been held valid in Franklin Needle Co. *v.* Franklin, 65 N. H., 177; Florida Central Railway Co. *v.* Reynolds, 183 U. S., 476; *Per contra*, Brewer Brick Co. *v.* Brewer, 62 Maine, 62.

constitutional. The purpose must be public, as for example, for schools, highways, canals, public buildings, markets, asylums, jails, or to keep the same in repair and to use them for public purposes. The Legislature cannot authorize a town or a county, or any subdivision of the State, to raise money for other than public purposes and uses. It cannot confer benefits on individuals, however meritorious, by taxation.[1]

48. Taxes, imposed under the Constitution, have been classed as direct or indirect,—the direct being apportionable among the States according to population; the indirect being uniform throughout the United States.[2]

The Sixteenth Amendment of 1913 abolishes the limitation of apportionment or enumeration in the imposition and collection of an income tax. The Income Tax law of October 3, 1913—the first of the kind enacted by Congress under the amendment—exempted incomes of $3000, or less, or $4000, or less, as the person taxed may be single or married. The amount of the exemption is fixed at the discretion of Congress. So too is the rate of taxation by duties, imposts, and excises, as well as the inclusion or exclusion of articles subject to them, but Congress must

[1] Loan Association *v.* Topeka, 20 Wallace, 655 (1874); Kingman *v.* City of Brockton, 153 Mass., 255 (1891); an admirable note citing decisions as to a good tax may be found in L. B. Evans, *Leading Cases on American Constitutional Law* (Ed. 1916), p. 211.

[2] Art. i., 2 : 3; 8 : 1.

make such taxes uniform throughout the United States.[1]

The taxing power may be used to encourage or to discourage an activity, or to destroy it. As thus used, the exercise of the taxing power, whether by the State or by the United States, may characterize the policy, or administration of its government. So too if a State engages in manufacturing, or in any activity or occupation taxable under federal revenue laws, it is amenable in taxes like a private person.[2]

[1] Art. i., 8 : 1. Kentucky Railroad Tax Cases, 115 U. S., 321 (1885); Kelly *v.* Pittsburgh, 104 U. S., 78 (1881); French *v.* Barber Asphalt Paving Co., 181 U. S., 324 (1901); Veazie Bank *v.* Fenne, 8 Wallace, 533 (1869); Corporation Tax Cases, 220 U. S., 611 (1911).

[2] South Carolina *v.* United States, 199 U. S., 437 (1905). The State conducted dispensatories and derived profit from them. It was held liable for internal revenue. The exercise by the State, as a dispenser, was held not to exempt it from the operation of the law.

CHAPTER V

THE LAW OF COMMERCE

49. The power to regulate commerce belongs to sovereignty. By the Constitution Congress is empowered "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." [1] The principle of this regulation, or of the exercise of the power, is essentially that of taxation: it is a matter of jurisdiction. "The power of Congress to regulate commerce," observes Chief Justice Marshall, in the first American judicial decision on the subject, "comprehends and warrants every act of national sovereignty which any other sovereign nation may exercise." [2]

The enormous powers Congress wields through this clause cannot be fully defined. The Supreme Court has not defined them. Like sovereignty itself, the exercise of its essential powers, even when delegated functionally in government, does not yield to the limits of definition. The decisions of the Supreme

[1] Art. i., viii., 3.
[2] Brig Wilson *v.* U. S., 1 Brockenbrough, 437 (1820).

Court are not definitions of the power over commerce so much as they are definitions of the particular exercise of the power of Congress within its jurisdiction, with respect to commerce, by the Constitution.[1] For the States also have jurisdiction over commerce. Our knowledge of the boundaries of these two jurisdictions arises from the conflict of laws concerning them.

50. In defining national jurisdiction and State jurisdiction over commerce, two propositions are fundamental:

(1) The Constitution of the United States is the supreme law of the land.[2]

(2) It is the province and duty of the judicial department to say what the law is.[3]

It should be clearly understood that power to regulate commerce is incident to sovereignty. Government—whatever its form—is a delegation of power by sovereignty, and of necessity possesses this power of regulation. The degree or extent of the delegation of the power to regulate commerce marks

[1] See decision of the Supreme Court sustaining the "Webb-Kenyon" Law decommercializing (interstate) intoxicating liquors, Clark Distilling Company *v.* W. Md. R. R. Co.; *Id. v.* Am. Ex. Co. and State of W. Va. (January 8, 1917).

The power of Congress to deal with the hours of work and wages of employees engaged in interstate commerce is examined in Wilson *v.* New and Ferris, Receivers, Mo. Ok., & G. Railway Co., March 19, 1917. (Constitutionality of the "Adamson" law.)

[2] Art. vi., 2.

[3] Marbury *v.* Madison, 1 Cranch, 177 (1803).

unmistakably the jurisdiction of the government exercising the power. The analogy is in the taxing power. In our system of dual government—national and State—there are two jurisdictions. The respective States have power over commerce; the United States has power to regulate commerce,—each jurisdiction expressly or impliedly outlined by the Constitution.

51. With slight change in wording, the leading decisions of the Supreme Court on the power of the United States to lay and collect taxes, and its decisions on the subject interpretative of the taxing power of the States, apply, in principle, to their respective powers over commerce:

If we measure the power of { taxation / "regulating commerce" } residing in a State, by the extent of sovereignty which the people of a single State possess and can confer on its government, we have an intelligent standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of { taxing the / "regulating people and property of the State / the commerce of the State" } unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the

States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers.[1]

52. No evil contributed more to the feebleness of the old Confederation than its inability to regulate commerce. The mischief being great, the grant of power to correct the mischief was correspondingly great. This grant of power to regulate commerce comprehends "all foreign commerce and all commerce among the States." As inefficiency was the evil, the grant of power was to secure efficiency. In construing this grant—the commerce clause of the Constitution—the large and single purpose is so to construe as not to impair its efficiency and thus defeat the object of the grant.[2]

The commerce clause has become the authority for exercising the enormous powers of the national government as is illustrated, possibly, by the exercise of power under no other clause. This means that the United States in exercising this delegated power exercises so vast a power that it seems to be sovereignty itself. Vast as this power is—and practically it is incommensurable—it is a delegated, not an original power of the national government. The scope, purpose, and nature of this national power to regulate commerce are indicated by the Supreme

[1] McCulloch *v.* Maryland, 4 Wheaton, 430 (1819).
[2] Brown *v.* Maryland, 12 Wheaton, 419 (1827).

Court in its construction of the commerce clause. Here as in the exercise of the taxing power the test is jurisdiction. The essential question is, What is the jurisdiction of the United States, what that of the respective States over commerce?

53. Commerce is intercourse,[1] and comprehends traffic, navigation, telegraphic intercommunication, and consequently, communication by telephone, wireless, or signals.[2]

The Constitution empowers Congress to regulate commerce "among the several States," an expression which excludes "the completely interior traffic of a State." This completely internal commerce is reserved for the State itself. To whatsoever extent the foreign or interstate commerce of the United States penetrates a State, it is subject to regulation by the United States; it is carried on within national jurisdiction. The power of Congress to regulate commerce within this jurisdiction is complete in itself and knows no limitations other than these prescribed in the Constitution. Thus this power to regulate commerce, though limited to commerce with foreign nations and among the States, and with the Indian tribes, is plenary as to these objects, and Congress in exercising this power is commonly spoken of as

[1] Gibbons *v.* Ogden, 9 Wheaton, 1 (1824).

[2] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1 (1877).

"sovereign."[1] It follows, that as the Constitution is the supreme law of the land, and the Supreme Court has power to say what the law is—State laws to regulate commerce, in conflict with national laws, are unconstitutional. The essential issue, in such conflict, is one of jurisdiction. And here, the real question is whether the regulation of commerce by a State is essential to its existence as a State, or regulation by the United States is essential to its existence as the United States. Such regulation by a State is known as the exercise of the police power.[2]

But the United States also possesses police power. The line of demarcation between the State and the national police power follows closely, if not precisely, the line of demarcation between State power and national power to regulate commerce.[3] The State has power to protect itself,—that is, to guard its people against contagious or infectious diseases, as is exemplified in laws for the inspection of foods, for forbidding the pollution of streams, for securing the accuracy of weights and measures, the peace and good

[1] So in Gibbon *v.* Ogden, *supra.*

[2] Henderson *v.* Mayor of New York, 92 U. S., 259 (1875); L. S. & M. S. Railway Co. *v.* Ohio, 173 U. S. (1899); Railroad Co. *v.* Husen, 95 U. S., 465 (1877); Brimmer *v.* Rebman, 138 U. S., 78 (1891); Morgan's S. S. Co. *v.* Louisiana Board of Health, 118 U. S., 455 (1886); Leisy *v.* Hardin, 135 U. S., 100 (1890); Schellenberger *v.* Pennsylvania, 171 U. S., 1 (1898).

[3] The trend of these respective lines is disclosed by the decisions in the cases cited in this Chapter.

order of communities, the comfort of the inhabitants, —and, in a word,—to exercise such authority as, were no such authority exercised, the State would cease being the State.

54. The power granted to Congress to regulate commerce is not a power granted to the States; it pertains to the United States only. Therefore Congress has no power to regulate commerce that is not "with foreign nations, and among the several States, and with the Indian tribes." Practically this deprives the State of police power over foreign and interstate commerce, and deprives the United States of police power over commerce that is, as to the State, completely internal. To what extent a State can protect itself from the entrance of paupers, insane or diseased persons, is a question for determination by the Courts. If such persons are "commerce" their entrance is a matter within the jurisdiction of Congress. But the welfare of the people of the United States is essentially the welfare of the people of the States, and Congress, in considering that welfare, avoids possible conflict with State legislation. Thus the immigration laws—all of which are national—include, or seek to include, these provisions for inspection which a State would prescribe, in the exercise of its police power for the health, safety, and general welfare of its own citizens. But here, too, a dominant principle prevails:

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.[1]

Tested by this principle, any State laws conflicting with national immigration laws are unconstitutional.

55. The power to regulate commerce among the several States extends to commercial highways and to agencies employed in such commerce. Thus waterways capable of navigation and the free and unobstructed use of them are subjects of congressional legislation under the commerce clause. From this it follows that Congress legislates concerning these waterways, their protection, their dredging, the bridges that cross them, the boats that navigate them, the form, size, construction, command, and equipment of these boats, the inspection of boilers, the licensing of officers,—indeed, concerning navigation in its broadest application under the commerce

[1] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1 (1877). The important word here is "jurisdiction." "To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State." Hanley *v.* Kansas City Southern Railroad Co., 187 U. S., 617 (1903). The Immigration Law (February 20, 1897, amended March 26, 1910), contains the protective features the State would demand through exercise of its police power. So too the Federal Meat Inspection Act (March 4, 1907).

clause. Vessels engaged in such commerce are described as "the public property of the nation, and subject to all the requisite legislation of Congress."[1]

56. In like manner, the national power to regulate commerce extends over interstate commerce when carried on by land transportation. Thus cars on railroads used in interstate commerce must be equipped with automatic couplers and continuous brakes, and locomotives with driving-wheel brakes.[2]

To what length this regulation of commerce may be carried by Congress is unknown, nor can it be determined in advance. The limitations, if any, are of expediency.[3] Thus in exercise of this vast power Congress may regulate hours of labor, wages, selection and use of material in construction of vehicles engaged in such commerce; the education, training, and conduct of persons engaged in handling such commerce; the age of employment; and physical equipment for the welfare of employees, as well as tariff rates and other incidents.[4]

[1] *The Daniel Ball*, 10 Wallace, 557 (1870).

[2] Act of Congress, March 2, 1893.

[3] "The insurance business does not constitute interstate commerce." Paul *v.* Virginia, 8 Wallace, 168 (1868). But the power to regulate commerce doubtless includes legislation placing common carriers engaged in interstate commerce under such federal control as to constitute federal ownership of railroads, telegraph and telephone lines, steamships, sailing vessels, etc., etc. Such ownership is illustrated in France, Germany, Italy, Russia, and in other countries.

[4] The Sherman Anti-Trust Law of July 2, 1890, and decisions of the Supreme Court concerning it, are illustrations.

57. But in the exercise of this power to regulate commerce Congress has legislated "to protect trade and commerce against unlawful restraints and monopolies."[1] Individuals, or corporations under State laws, engaged in business, in so far as they are contracts, combinations in the form of trusts, or otherwise, or conspiracies in restraint of trade or commerce among the several States are illegal. The test here is, Are such combinations in restraint of commerce among the several States, or with foreign nations, or with the Indian tribes? If any such combination be in restraint of commerce completely internal in a State, it does not fall within the jurisdiction of the United States. If illegal, it is illegal by State laws.[2] Thus a combination that is engaged in manufacturing is within the jurisdiction of the police power of the State, not within the jurisdiction given by the commerce clause of the Constitution.[3] The regulation of manufactures is not the regulation of commerce. A monopoly of manufacturing is not necessarily a monopoly of commerce among the several States. In other words, manufacturing is not commerce. The Constitution does not give Congress power to regulate manufactures. How-

[1] See the Hours of Service Act (March 4, 1907); the Adamson Act (1916), and other acts indicative of the trend in the congressional exercise of the power.

[2] United States *v.* E. C. Knight Co., 156 U. S., 1 (1895).

[3] Art. i., 8:3.

ever, as soon as the article manufactured becomes an article of commerce among the several States, then it is subject to regulation by Congress.

58. As soon as the article is manufactured it is subject to the law of the State; the moment the article commences its final movement from the State of its origin, that moment it is an article of commerce as that word is used in the Constitution, and is within the jurisdiction of Congress.[1]

Manufacture is transformation,—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense, embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subjects of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry.[2]

Assumption of power such as this by Congress would conflict with the residuary powers of the States,—powers over intrastate commerce, and that vast

[1] Coe *v.* Errol, 116 U. S., 525.
[2] Kidd *v.* Pearson, 128 U. S., 1.

authority possessed by the States and known as their police powers. Were such authority possessed and exercised by Congress, the State governments would be paralyzed and between the States and the United States there would be endless conflict.

59. It is not the delegation to Congress of power to regulate commerce that makes the exercise of a similar power by the State void; it is the actual exercise by Congress of its power to regulate commerce that works the prohibition. In the absence of congressional legislation on the subject the State may legislate. Thus a State law for the regulation of pilots and pilotage, in the absence of Federal law for the same, is valid.[1] This means that sovereignty acting through the State government controls—or has jurisdiction—unless sovereignty has acted in the matter through the government of the United States. Thus, where the subject, say a bridge, a wharf, or a stream, over which power may be exercised, is local in its nature and operation, or constitutes a mere aid to commerce, the authority of the State may be exerted for its regulation and management until Congress interferes and supersedes State action.[2]

But a license fee exacted by a State law, from a vessel engaged in commerce is a tax for the use of

[1] Cooley *v.* Board of Wardens of the Port of Philadelphia, 12 Howard, 299 (1851).

[2] Escanaba Company *v.* Chicago, 107 U. S., 678 (1882).

navigable waters and not a charge in the nature of compensation for any specific improvement, or use of wharves. It is a burden on commerce and is a State regulation of commerce in conflict with the power of Congress to regulate it and therefore unconstitutional.[1] But the internal commerce of a State, that is, the commerce that is wholly confined within its limits is as much under its control as foreign or interstate commerce is under the control of the general government.[2]

60. By the words "taxation of commerce" is understood the taxation of the agency, means, instrument, vehicle, or article in such a way or with such effect as to control commerce; and by "control" is understood any degree of control. If the State can tax foreign or interstate commerce lightly, it can tax it heavily, and if heavily, it can so tax as to destroy commerce. So long as the article imported remains in the original form of package, the property of the importer, in his warehouse, it is within the jurisdiction of the United States; but as soon as it has become incorporated and mixed with the mass of property in the State, it is within the jurisdiction of the State and becomes subject to its taxing power.[3]

Were the State to tax the importer as such, this

[1] Harman *v.* Chicago, 147 U. S., 396 (1893).
[2] Sands *v.* Manistee River Improvement Company, 123 U. S., 238.
[3] Brown *v.* Maryland, 12 Wheaton, 419 (1827).

would be a tax on importation and beyond State jurisdiction. So too would be any charges, imposed by the State, on the introduction or incorporation of the imported article into and with the mass of property in the State. The essential principle here is that the taxing power of the State cannot reach and restrain the action of the national government within its proper sphere. "It cannot interfere with any regulation of commerce."[1]

61. The object in delegating to Congress the power to regulate commerce—a delegation without limitations—was to insure uniformity against discriminating State legislation.[2] The large and fundamental purposes of the people of the United States in establishing a national government are cited in the Preamble to the Constitution. Unless the power to regulate commerce with foreign nations and among the several States was delegated to Congress, these fundamental purposes could not be realized.[3] It is a nice question: When has the commercial power of the United States over a commodity ceased and the power of the State commenced? The Supreme Court answers: The federal commercial power continues until the commodity has ceased to be the subject of

[1] Brown *v.* Maryland, 12 Wheaton, 419 (1827).

[2] Walton *v.* Missouri, 91 U. S., 275 (1875).

[3] The evil effect of discriminating State legislation, and the like, during the Articles of Confederation, are dwelt on by the Court in Walton *v.* Missouri, *supra.*

discriminating legislation by reason of its foreign character. That power protects it even after it has entered the State from any burdens imposed by reason of its foreign origin.[1] Any article brought into a State, as an article of commerce, from another State,—that is from another political jurisdiction possesses "foreign character." The principle involved here may thus be stated: (1) The Constitution having given Congress power to regulate commerce with foreign nations and among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. (2) Where the power to regulate is exclusively in Congress, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except only in matters of local concern, is repugnant to such freedom. (3) The only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power, and by its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property. But these police regulations, affecting commerce only incidentally,—such as

[1] Walton *v.* Missouri, *supra.*

(for example) the establishment and regulation of highways, canals, railroads, and wharves by taxation as forming part of the mass of property within the State,—must be strictly internal regulations, not imposing taxes on persons or property passing through the State, or coming into it for a temporary purpose and forming no part of the common mass of property within its jurisdiction. Any State regulation which discriminates adversely to the persons or property of other States is an unauthorized interference with the power of Congress over the subject.[1]

62. Interstate commerce cannot be taxed by the State even though the same amount of tax should be laid by the State on commerce carried on wholly within its limits.[2] The right involved is not a State right. "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."[3] That persons engaged in such commerce are incorporated under the laws of a State and thereby possess facilities for carrying on their business cannot deprive them of their fundamental right as against the State, but Congress, by its power to regulate commerce, may prescribe con-

[1] Robbins *v.* Shelby County Taxing District, 120 U. S., 489 (1887).

[2] *Idem.*

[3] Crutcher *v.* Kentucky, 141 U. S., 47 (1891).

ditions under which their business is carried on, or by regulation, destroy their business entirely.[1] Thus a State cannot, by a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.[2] But it is within the police power of a State to protect the lives and health of its people, and to protect property through laws suppressing nuisances; prohibiting manufactures injurious to the public health; prohibiting the manufacture and sale of intoxicating liquors; prohibiting lotteries, gambling, horse-racing, or anything else which the Legislature considers opposed to the public welfare.[3] A local regulation limiting the speed of trains on entering a town or city, or approaching a curve or a bridge, or requiring a train to stop at a particular place, comes within the exercise of the police power of the State.[4]

63. The power of a State over commerce being exclusive only as to commerce strictly internal and within its own boundaries,—that is, within its own

[1] As by the act forbidding the transportation of lottery tickets through the mails.

[2] Crutcher *v.* Kentucky, 141 U. S., 47 (1891).

[3] *Idem.* Cases decisive of the police powers of a State are numerous. The principle involved may be deduced from Railroad Company *v.* Huson, 95 U. S., 465 (1877); Brimmer *v.* Rebman, 138 U. S., 78 (1891); Morgan's S. S. Company *v.* Louisiana Board of Health, 118 U. S., 455 (1886); Leisy *v.* Hardin, 135 U. S., 100 (1890); L. S. and M. S. R. R. *v.* Ohio, 173 U. S., 285 (1899).

[4] Crutcher *v.* Kentucky, *supra.*

jurisdiction,—it follows that "a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations."[1] Taxation, by a State, of goods coming into it from another State, would destroy freedom of trade within the nation, which Congress has seen fit shall remain undisturbed. This freedom of trade is national in character, and interference with it, by a State, would violate a function and defeat the purpose of nationality: that is, such violation would prevent the people of the United States from realizing their own sovereignty.

64. An illustration of the constitutional use of the power of the State over commerce is afforded by the tax, in Texas, on telegraph messages sent from one place to another exclusively within the State, by private parties, and not by the agents of the government of the United States. The Texas law imposing this tax is not in conflict with the power of Congress to regulate commerce,[2] and therefore was not repugnant to the Constitution of the United States. The line of demarcation as to exercise of the police power by a State is drawn "by the undoubted right of the States of the Union to control their purely

[1] Brown *v.* Houston, 114 U. S., 622 (1885), in which the cases are cited.

[2] Telegraph Company *v.* Texas, 105 U. S., 460 (1881).

internal affairs, in doing which they exercise powers not surrendered to the general government."[1]

Many State laws regulating its administration of internal affairs are applications of its police power. The police power of the State is of right, and is founded on "the sacred law of self-defense."[2] But this sacred law applies strictly to the domain of the State—to its own jurisdiction. "It cannot invade the domain of the national government."[3] A State inspection law is a familiar example of the exercise of its police power, but such a law, working obstruction of interstate commerce, or any limitation of it, though such effect be only incidental, is repugnant to the Constitution.[4] Such repugnancy is effected by a State law levying a tax on tonnage, and is void.[5] But a charge for mooring or landing at a wharf, is not a tax on tonnage, but a charge for services rendered;[6] neither is the tax a tonnage tax when the State imposes a tax on vessels (even if regularly engaged in interstate commerce), the property of

[1] Leisy *v.* Hardin, 135 U. S., 100 (1890). An act of the Legislature, or a constitutional provision prohibiting the manufacture or sale of intoxicating liquors within a State, is an example of exercise of the police power by a State. See also Rhodes *v.* Iowa, 170 U. S., 412 (1898). Schellenberger *v.* Pennsylvania, 171 U. S., 1 (1898); and cases cited *supra* touching State police power.

[2] The Passenger Cases, 7 Howard, 283.

[3] R. R. Co. *v.* Huson, 95 U. S., 465 (1877).

[4] Turner *v.* Maryland, 107 U. S., 38 (1882).

[5] Inman S. S. Co. *v.* Tinker, 94 U. S., 238 (1876).

[6] Packet Co. *v.* Keokuk, 95 U. S., 80 (1877).

persons residing within the jurisdiction of the State, the vessels themselves being part of the mass of property within the State, being moored for long periods at the wharf for repairs and being under the protection of the State. The taxing power is a distinct and separate power from the power to regulate commerce. The right of taxation in a State remains over every subject where it existed before the adoption of the Constitution with the exception only of prohibitions expressed or implied in the Constitution.

The sovereign jurisdiction of the State is not limited; within that jurisdiction it is free to tax. But the powers to tax and to prohibit taxation are given in the Constitution by separate clauses, and these powers are separate and distinct from the power to regulate commerce. From this it follows that the enrolment of a ship or vessel in interstate commerce does not exempt its owner from taxation for his interest in it as property, upon a valuation by State law, as in the case of other personal property.[1]

65. There ever remains the question of the extent of the power of Congress to regulate commerce. American constitutional law as to commerce is largely of what the States may not do. But the enormous power of Congress to regulate commerce, more and more as the years pass,—as the meaning of "national jurisdiction" is defined by the courts of law,—the

[1] Transportation Co. *v.* Wheeling, 99 U. S., 273 (1878).

definition, however, slowly conforming to public opinion,—discloses the extent of the federal power through the commerce clause. Doubtless Congress has made but a beginning in its exercise of this power. Thus it has made lottery tickets articles of commerce, has excluded them from the mails, has assumed plenary authority of the carriage of such articles from State to State, and, by authority of the commerce clause has practically destroyed the lottery business in the United States.[1] The principle here decided is that, under the power to regulate commerce, regulation may take the form of prohibition, and that the power "may be exerted with the effect of excluding particular articles from such commerce."[2]

In this decision the Court observes, "that the suppression of nuisances injurious to public health or morality is among the most important duties of government," and quotes an earlier decision as to "the widespread pestilence of lotteries." It might seem that while exercising its powers under the commerce clause Congress was really exercising the police power of the United States.

66. Of highest importance is the act of Congress of July 2, 1890, and later amendments, known as the Anti-Trust Act, entitled, An "Act to Protect Trade and Commerce against Unlawful Restraints and

[1] Lottery Cases, 188 U. S., 321 (1903). [2] *Id.*

Monopolies." The decisions growing out of this act have been made on issues involving the particular questions whether or not restraints and monopolies so-called were such under the act and conflicted with it. The power of Congress, under the commerce clause to prohibit such restraints and monopolies has not been denied. It will be remembered that power to regulate commerce is not power to regulate manufactures. The purpose of the Anti-Trust law[1] is "to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy formed by either natural or artificial persons, such a power has been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation.[2] The principle involved here is as to the power of corporations organized under State laws to restrain or to monopolize interstate commerce. The State has no power to create corporations with such powers, and consequently they cannot exercise them lawfully. And like attempts to restrain and monopolize interstate commerce made by individuals is alike unlawful.[3]

67. So, too, where a labor organization sought by a boycott to prevent the manufacture of articles in-

[1] 26 Statutes at Large, 209.

[2] Northern Securities Company *v.* United States, 193 U. S., 197 (1904).

[3] Beef-Trust case, Swift and Co. *v.* U. S., 196 U. S., 375.

tended for interstate commerce, and to prevent the re-selling of these articles in other States, the combination and plan were held to be restraint of commerce and in violation of the Anti-Trust act.[1] The cases strongly suggest that federal laws to regulate commerce may be essentially police regulations as, notably, laws requiring safety appliances on railroad trains and steamboats; laws regulating hours of labor and child labor; laws requiring arbitration of controversies between employers and employees operating in interstate commerce; the pure food law; the exclusion of lottery tickets from the mails, and the like. The Constitution contains no clause explicitly delegating the police power to the United States, and the exercise of police power by Congress has thus far been quite without exception under the commerce clause. Yet by parity of reasoning, the police power may be included under the power to declare war.

68. There is such a thing as the peace of the United States.[2] The enormous power of Congress under the commerce clause has undoubtedly promoted that peace: "domestic tranquillity" is one of the specified purposes in ordaining and establishing the Constitution. As absence of power to regulate

[1] Danbury Hatters' Case, Loewe *v.* Lawler, 208 U. S., 274; see also Pullman Car Company, 64 Fed. Reporter, 724.

[2] *In re* Neagle, 135 U. S., 1 (1889).

commerce marked the weakness of the Articles of Confederation, so the special inclusion of that power among those delegated to Congress marks the strength of the Constitution.

69. Within their respective jurisdictions the United States and the several States have power to regulate commerce. The power over commerce, in either jurisdiction, is exercisable within the principle of self-preservation. Whatsoever exercise of this power is essential to the existence of either government belongs to that government and cannot be repugnant to the other, that is, under the dual system of American constitutional government. Simple as this principle may seem, its practical application in defining the two jurisdictions, or the authority of either government, involves all the issues in American constitutional law, and the decisions of the American judiciary in cases arising under the commerce clause of the Constitution.

A notable instance of the authority given by the commerce clause is the power of Congress, over the transportation of the mails, to prevent "any unlawful and forcible interference" with them. "The strong arm of the government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails"; "the United States have a property in the mails." The contents of the mail-bags—that is, matter law-

fully mailable—are commerce in the sense in which that word is used in the Constitution.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.[1]

Under the commerce clause Congress

may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes regulate to any substantial extent interstate commerce.

And "interstate" also includes "foreign commerce."[2]

All the decisions

illustrate the principle that Congress in the exercise of its paramount power may prevent the common instru-

[1] *In re* Debs, 158 U. S., 564 (1895).

[2] The Addystone Pipe & Steel Company *v.* United States, 175 U. S., 211 (1899).

mentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.[1]

[1] The Shreveport Case, (Houston, East and West Texas Railway Co. *v.* United States; Texas and Pacific Railway Co. *v.* United States) 234 U. S., 342 (1914).

NOTE.—Cases further illustrating prohibition of a business or activity by operation of laws passed under the commerce clause: United States *v.* Holliday, 3 Wallace, 407 (1866); Buttfield *v.* Stranahan, 192 U. S., 470 (1904); U. S. *v.* Del. & Hudson Ry., 213 U. S., 366 (1909); Hope *v.* U. S., 227 U. S., 308 (1913).

Cases illustrating exercise of the power over commerce given by the clause and exercising jurisdiction over commerce claimed to be intrastate but forming as it were a link in the chain of interstate commerce: Lord *v.* S. S. Co., 102 U. S., 541 (1880); Wilmington Transportation Co. *v.* California Railroad Commission, 236 U. S., 151 (1915); Hanley *v.* Kansas City Southern Ry., 187 U. S., 617 (1903).

It will be well to read the dissenting opinions in any of these cases as these usually emphasize the power of the State over commerce.

CHAPTER VI

THE LAW OF CONTRACTS AND PROPERTY

70. The supreme law of the land provides that no State shall pass any law impairing the obligation of contracts.[1] A contract is an agreement between competent persons to do or not to do a certain thing; the law is part of the contract.[2] An unlawful contract cannot be made, for the so-called contract, being unlawful, has never existed as a contract. The limitation as to contracts in the Constitution is on the States. Thus a State can no more impair its own contracts, by legislation, than it can impair the obligation of the contracts of individuals.[3] A sovereign State is supposed to have a more scrupulous regard to justice, and a higher morality than belongs to the ordinary transactions of individuals.

71. A State may incorporate a bank which, by its charter, is empowered to issue, and does issue, stock, bills, or notes. These are contracts. By its

[1] Art. i., 10 : 1.
[2] McCrackin *v.* Hayward, 2 Howard, 608 (1844).
[3] Woodruff *v.* Trapnall, 10 Howard, 190 (1850).

police power the State may repeal that section of the bank's charter authorizing issues of notes, but legislation affecting the stock, or notes, so as to impair their obligation is unconstitutional.[1] The question is not one of currency but of impairing the obligation of a contract. A legislature may make a contract binding upon later legislatures,—as a law existing at the time contracts under it are made, it becomes part of them, but a municipal act levying a tax upon city bonds held by non-residents diminishes the value of the bonds and therefore impairs the obligation of a contract.[2] For the bonds call for a certain interest payment at a certain time, and a tax upon them, and retaining the same from payment, make an entirely different contract from the original. The constitutional provision against impairing contract obligations is a limitation on the taxing power as well as on all legislation—whatever its form.[3]

72. But such limitation must not be confused with legitimate exercise of the police powers of the State. Thus an arrangement determinable at the will of either party is not a contract beyond control, change, or cessation under the police power. For example, a bounty law, as for killing destructive animals, or for the encouragement of manufactures (the boring of salt wells and pumping of water from

[1] Woodruff *v.* Trapnall, 10 Howard, 190 (1850).
[2] Murray *v.* Charleston, 96 U. S., 432 (1877). [3] *Idem.*

them for making salt), does not involve the State in a contract. It is a matter purely voluntary on the part of those who avail themselves of the opportunity, and the Legislature may or may not continue the law at discretion, as a matter of public policy.[1]

73. The execution of an office to which a person has been lawfully elected, or appointed, by the performance, by him, of its duties, is a completed contract, with perfect obligation to pay for services rendered at the rate of compensation fixed by the contract, and this obligation can no more be impaired by a law of the State than that arising on a promissory note.[2]

74. The charters of private charitable institutions are contracts within the letter of the Constitution, and their obligation cannot be impaired without violating it.[3] But if a charter to a corporation, for example a railroad, or a college, provides for possible alteration or amendment by the Legislature of the State, such power of alteration duly exercised by a later Legislature is not unconstitutional as impairing the obligation of a contract.[4]

75. The police power of the State extends to

[1] Salt Company *v.* East Saginaw, 13 Wallace, 373 (1871).

[2] Fisk *v.* Jefferson Police Jury, 116 U. S., 131 (1885).

[3] Trustees of Dartmouth College *v.* Woodward, 4 Wheaton, 518 (1819).

[4] Case of the conjunction of Washington and Jefferson Colleges, Pennsylvania College Cases, 13 Wallace, 190 (1871).

the protection of the lives, health, and property of citizens, and to the preservation of good order and the public morals, nor can the Legislature, by any contract, divest itself of the power to provide for these objects.

> They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself.[1]

In exercise of this police power the Legislature prohibits the manufacture and sale of malt liquor. Such manufacture or sale is not an exercise of a right by contract, and prohibition of the business is not legislation impairing the obligation of a contract.[2] So too, a provision in a State constitution forbidding lotteries and gift enterprises within a commonwealth, and revoking lottery charters theretofore granted, is not a law impairing the obligation of a contract.[3] The principle followed here is expressed by the Chief Justice (Waite): "No legislature can bargain away the public health or the public morals." Thus it may be accepted as settled constitutional law that the people in their sovereign capacity and through

[1] Boyd *v.* Alabama, 94 U. S., 645.
[2] Beer Company *v.* Massachusetts, 97 U. S., 25 (1877).
[3] Douglas *v.* Kentucky, 168 U. S., 488 (1897).

their properly constituted agencies may exercise powers as the public good may require.[1] But corporations and private persons possessing and exercising rights and franchises vested in them by law and possessing property rights by contract are entitled to compensation when, under the State power of eminent domain, such vested rights are taken away.[2]

76. Whether property or employment possesses the qualities or attributes of a public use will largely determine the character of legislative control for the purpose of safe-guarding the public against "danger, injustice, and oppression"; the police power of the State is here paramount.[3]

77. The principle involved in the obligation of contracts is clearly set forth by the Supreme Court:

In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried out into execution; annulling State legislation which im-

[1] Douglas *v.* Kentucky, *supra;* New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S., 650 (1885).

[2] See the cases cited in New Orleans Gas Co. *v.* Louisiana, *supra.*

[3] Georgia R. R. and Banking Co. *v.* Smith, 128 U. S., 174 (1888); East Hartford *v.* Hartford Bridge Co., 10 Howard, 511 (1850). But a judgment (judicial decision) is not a contract in the meaning of the Constitution. Morley *v.* L. S. & M. S. R. R., 146 U. S., 162 (1892).

paired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence, any law which, in its operation, amounts to a denial, or obstruction, of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.[1]

[1] McCrackin *v.* Hayward, 2 Howard, 608 (1844). All legal remedies for the enforcement of a contract belonging to it at the time and place when and where it is made are a part of its obligation. Any provision of a State law or constitution impairing such remedies are void. Gunn *v.* Barry, 15 Wallace, 610 (1872); Mitchell *v.* Clark, 110 U. S. (1884). But the prohibition, in the Constitution, of any State to make any law impairing the obligation of contracts "did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised." Civil Rights Cases, 109 U. S., 3 (1883).

78. The prohibition of legislation impairing the obligation of contracts does not extend to the United States as it does to the States. Thus in the Legal Tender Cases[1] and in sundry bankruptcy cases.[2] the Supreme Court has decided that the exercise of the power of Congress "does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself." This means that the United States possesses a police power, *salus populi suprema lex*, in exercise of which at the discretion of Congress, the obligation of contracts must yield to the higher obligation of the general welfare.[3]

79. It is a fundamental of government in America that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without compensation.[4] The prohibition and protection as to due process of law extends both to the United States and to the States. The taking by a State of the private property of a person,—and a corporation is legally a person,—without the owner's consent, for the private use of another is not due process of law,[5]

[1] Juilliard *v.* Greenman, 110 U.S., 421 (1884), and see note *supra*, p. 92.

[2] Consult Mitchell *v.* Clark, 110 U. S., 633 (1884) from which the quotation is taken.

[3] This raises the whole question of national sovereignty.

[4] Amendment V.; XIV.

[5] Missouri Pacific Ry. *v.* Nebraska, 164 U. S., 403 (1896).

and it violates the Fourteenth Amendment. A State possesses exclusive jurisdiction and sovereignty over persons and property within its territory and consequently may determine for itself the civil status and capacities of its inhabitants; may prescribe the subjects upon which they may contract, and regulate the manner and conditions upon which property situated within its territory—or jurisdiction—may be acquired, enjoyed, and transferred; but no State can exercise direct jurisdiction and authority over persons or property without its jurisdiction. The laws of a State have no operation outside its territory "except so far as is allowed by comity; any exertion of authority by a State beyond its territory is a nullity." The sovereign power of the State over property within its jurisdiction, belonging to non-residents is exercisable as over the property of residents. But the property right of the non-resident cannot be invalidated save by due process of law, which means, *inter alia*, the right of the non-resident to appear personally, or by representative, in the courts of the State to protect his own interests. A State law under which a non-resident's property should be taken without such notice would be unconstitutional by the Fourteenth Amendment.[1]

[1] Pennoyer *v.* Neff, 95 U. S., 714 (1877); Arndt *v.* Griggs, 134 U. S., 316 (1890).

But the Fourteenth Amendment does not deprive the States of their police power over "subjects within their jurisdiction."[1]

80. The right of eminent domain is essentially of the police power, and for State purposes is exclusively within the State. Each State in the Union regulates its domestic commerce, contracts, the transmission of estates,—real and personal—and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated.[2] Thus a State constitution, or a statute under it, prohibiting the manufacture and sale of intoxicating liquors, except for medicinal, scientific, and mechanical purposes, does not conflict with the clause of the Fourteenth Amendment which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person

[1] Cunnius *v.* Reading School District, 198 U. S., 458 (1905), sustaining a Pennsylvania statute that provided for administration upon estates of persons presumed to be dead by reason of long absence from the State. Mattingly *v.* District of Columbia, 97 U. S., 687 (1878); that which a State Legislature may have dispensed with by a prior statute it may dispense with by a subsequent one; an irregularity or defect which might be made immaterial by prior law, the Legislature has power to make immaterial by a subsequent law. Cooley, Constitutional Limitations, 371.

[2] License Cases, 5 Howard, 588.

of life, liberty, or property, without due process of law." The so-called "right" to manufacture or sell such articles is not a right growing out of citizenship of the United States.[1] Such manufacture or sale, or its prohibition is wholly within the power of the State to control.[2]

Such control is of wholly internal affairs. The right to manufacture or sell such articles is not a right under a contract as the word *contract* is used in the Constitution.[3] Prohibition of the manufacture and sale of such articles, save as excepted, does not deprive the citizen of his constitutional rights. Such prohibition is the policy of the supreme power in the State and is an exercise of a function within its jurisdiction.

The exercise of the police power of the State by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[4]

81. The provision of the Constitution that private property shall not be taken for public use without

[1] Bartemeyer *v.* Iowa, 18 Wallace, 129.
[2] Foster *v.* Kansas, 112 U. S., 201.
[3] Mugler *v.* Kansas, 123 U. S., 623 (1887).
[4] *Idem.*

compensation is a limitation on the power of the federal government, and not on the States,[1] but the State constitutions usually include the limitation in their Bills of Rights: the principle is "essentially a part of American constitutional law."[2]

82. For consequential injury resulting from the exercise of the power of eminent domain there is no redress,[3] but where such exercise of power works effectual destruction of land so as to impair its usefulness, it is a taking of property for public use and the owner is entitled to compensation.[4] The principle here is that,

> If in such cases suitable and adequate provision is made by the Legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private right.

It is also a well-established principle that no construction of the clause in the Bill of Rights (in any constitution) providing compensation for property taken for a public use shall so extend the benefits of the clause as to give indirect or consequential

[1] Amendment V.
[2] Pumpelly *v.* Green Bay Co., 13 Wallace, 166 (1871).
[3] *Idem.*
[4] Preceding case and Central Bridge Corporation *v.* City of Lowell, 4 Gray (Mass.), 474 (1855).

damages to a person when the public already has a rightful use of the property.[1]

83. Though the right of eminent domain and its exercise are not enumerated in the Constitution, the power being inseparable from sovereignty and the right being the offspring of political necessity, must be recognized as existing. The right is one of these which is not denied, and being essential, is implied. Were the right to acquire property, and for other purposes, denied the United States, the unwillingness of property-holders to sell, or legislation by a State prohibiting a sale to the federal government would make nugatory the government itself, and its existence would thus depend upon the will of a State, or even upon that of a private citizen.[2] The essential matter here is of sovereignty, or jurisdiction. The two sovereignties, the several States and the United States, possess, each, this right commensurable with their respective jurisdictions.

The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take

[1] Pierce *v.* Drew, 136 Mass., 75 (1883). The case grew out of plaintiff's claim for damages because the town had granted a telegraph company the right to erect its poles, wires, etc., along the highway abutting plaintiff's land. The highway being land in public use, plaintiff claimed indirect or consequential damages because of the erection of the poles, wires, etc., of the duly franchised telegraph company. Plaintiff's complaint was (*inter alia*) that said poles, wires, etc., disfigured and depreciated his property. See also Bedford *v.* U. S., 192 U. S., 217 (1904); the principle therein further examined.

[2] Kohl *v.* United States, 91 U. S., 367 (1875).

private property for its own public uses, and not alone for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State.[1]

[1] Kohl *v.* United States, 91 U. S., 367 (1875).

CHAPTER VII

THE LAW OF THE EXECUTIVE POWER

84. The executive power of the United States is vested in a President. The executive is single,—that is, one person. He possesses all the executive powers which the sovereign,—the people of the United States, have conferred. His power is derivative, not original. His power is not defined by the Constitution, that is, it is not fully set forth by limitations. It is limited in two particulars: he cannot grant reprieves or pardons in cases of impeachment, and he solemnly swears or affirms faithfully to execute the office of President of the United States. This solemn obligation implies that he himself is not the sole or the final judge of his fidelity in executing his office. This responsibility of the President to a superior, in certain cases, is clearly stated by the Constitution itself: first, that the House of Representatives shall have the sole power of impeachment, and secondly, that the Senate shall have the sole power to try all impeachments, and when sitting for that purpose, its members

shall be on oath or affirmation. When the President is tried, the Chief Justice of the United States shall preside, and no person shall be convicted without the concurrence of two thirds of the members present.[1]

85. Whether or not the President has performed the duties of his office is a political question and may alone be determined by impeachment and conviction. President Johnson was impeached but not convicted,—whence the conclusion that he faithfully executed the office of President. The term "office" is not used in the Constitution as descriptive of the exercise of legislative power by either House or by its respective members. Senators and Representatives receive a compensation for their "services." No person holding any "office" under the United States can be a member of either House during his continuance in "office."[2] But the Constitution does not apply the term "office" to the two-year term of a Representative, or to the six-year term of a Senator, or to the duties, rights, privileges, qualifications, or powers of either. We shall see that the term is applied to judges of the United States.

86. The executive power of the United States is vested in a President, and the faithful exercise of

[1] Art. i., 2 : 5; 3 : 6.

[2] Compare Art. i., 6: 1, 2; 9 : 8; Art. ii., 1 : 1; Art., 5, 8; "officer" in Art. ii., 2 : 1, 2; Art. ii., 4 : 1; "offices" in Art. iii., 1 : 1; vi., 3. There is every reason that the framers of the Constitution used words with profound discernment and discriminating care.

that delegated power is the faithful execution of the office of President. From the nature of the power it cannot be defined. The office was created by the people of the United States at the close of the eighteenth century, when distrust of the executive (the crown) was dominant in the American mind. The trend then was to enthrone the legislative and to dethrone the executive. It is remarkable that the supreme law of the land, made at that time, should vest such vast powers in the executive. He is commander-in-chief of the army and navy and of the State militia when in the actual service of the United States[1] but Congress alone can declare war.[2] He participates in legislation, and possesses the veto power (which constitutionally comprises that participation)[3] but unlike the governor, under some later constitutions, he cannot veto a particular item in an appropriation bill.[4]

He makes treaties, provided two thirds of the Senators present concur,[5] and the control of our foreign relations is in his hands.[6] Thus, though not possessing the war power by the verbal provisions of the Constitution, he may by his policy, involve the United States in war. He possesses the appointing power, thus determining who shall fill judicial

[1] Art. ii., 2 : 1. [2] *Id.* i., 8 : 11. [3] *Id.* i., 7 : 2.
[4] Constitution of Pennsylvania, 1873, iv., 16.
[5] Art. ii., 2 : 2. [6] *Id.* *The Federalist*, No. lxxv.

and administrative offices, under the Constitution,[1] a power, the exercise of which practically determines the character of the federal government. In brief, excepting members of the Senate and of the House, all now elected directly by the people and who, at present, comprise, numerically, about one one thousandth part of the aggregate public servants in the government of the United States, the President,—that is, the executive power of the United States delegated to the President, appoints the vast body of officials in the national service. Most of these officials have ministerial duties; a few have judicial. Strictly speaking, the President is the only executive officer provided for by the Constitution.

87. In the "Executive Department" (an expression known to the Constitution[2]), it is the President alone who makes the appointments. "The principal officer in each of the executive departments" is known to us as a member of the Cabinet, and is an appointee of the President. The office of a member of the Cabinet affords an illustration of that rare tenure, a tenant at will. This tenure is stated by Lincoln in a memorandum read to his Cabinet: "I must myself be the judge how long to retain and when to remove any of you from his position."[3]

88. The President cannot be enjoined from dis-

[1] Art. ii., 2 : 2.
[2] *Id.*, 2 : 1.
[3] July (14?), 1864. Lincoln's *Works* (Century Ed.) i., 548.

missing, or be mandamused to receive a person, from or into his Cabinet. Indeed, such is the nature of the office of President, he is not amenable to writs of the law. He cannot be compelled by law to approve or to disapprove a bill that has passed Congress; or to appoint or to refrain from appointing any person to any office within his jurisdiction. Nor can he be questioned in any court of law respecting his office, nor be made a witness in any controversy. His powers are adequate to the execution of his office. It may be said that this is essentially true of the legislative,—the Congress, and of the judiciary,—the Courts of the United States.

89. Thus the President has power to protect a federal judge from threatened personal attack.[1] He has power to receive ambassadors and other public ministers and representatives of other sovereignties, a power which implies his right to refuse to receive those sent, or to dismiss those sent, or to request their recall, or to discontinue relations with them. Nor can any person, or State, through any court of law, compel or forbid him to do either. In other words, the powers of the President of the United States are executive, not ministerial. This distinction applies to no appointee of the President, in any of the executive departments. Their office

[1] *In re* Neagle, 135 U. S., 1 (1889).

is ministerial and every ministerial office in the government of the United States is subject to inquiry through a court of law.[1]

Thus the executive power of the United States is not subject to the legislative power.[2] We have seen that it is not subject to the judicial power. Yet, if this be so, by what power can the President be impeached for not faithfully executing his office?

90. The restraint of impeachment is not legislation nor the exercise of legislative powers vested in Congress. Impeachment is the accusation made by the House of Representatives that the President has not faithfully executed his office. Conviction is the adverse judgment of the Court of Impeachment, —the Senate sitting under special oath for a special purpose, not legislative, as duly provided for by the Constitution. Had the people of the United States, in 1787, chosen to provide, in the Constitution, for a Court of Impeachment consisting, say, of Governors of States, or that State Legislatures should have the sole power of impeachment, no one would claim that the governors or the legislators so engaged were exercising either executive or legislative func-

[1] Spaulding *v.* Vilas, 161 U. S., 483; U. S. *v.* Windom, 137 U. S., 636; U. S. *v.* Blaine, 139 U. S., 306. Marbury *v.* Madison, 1 Cranch, 137; Kendall *v.* U. S., 12 Peters, 524; U. S. *v.* Black, 128 U. S., 40; Mississippi *v.* Johnson, 4 Wallace, 475; Georgia *v.* Stanton, 6 Wallace, 57.

[2] *Ex parte* Garland, 4 Wallace, 333 (1886).

tions. So the Houses of Congress engaged in an impeachment trial of the President, or of any "officer of the United States" are not engaged in legislation. If Congress possessed legislative power to remove the President, it could vacate the presidential office by an act and pass it over the President's veto. Such a power vested in Congress would nullify the power vested in the President and would make him a creature of Congress.

91. The constitutional provision that when the Senate sits as a Court of Impeachment the Chief Justice of the United States shall preside,[1] in no way affects the judicial power vested in the supreme and inferior Courts of the United States. The reason for the provision is obvious. The Senate, which is the special Court of Impeachment, has ordinarily, and by the Constitution, two presiding officers: one, *ex officio*, the Vice-President; the other, the President *pro tempore*, who is a Senator.[2]

The conviction of a President removes him from the office and the Vice-President (or whosoever by law is in line of succession) succeeds him. The President *pro tempore* of the Senate, votes in the Court of Impeachment as a Senator. If either the Vice-President, or the President *pro tempore* presided over the Court of Impeachment, when a President is on trial, the principle of freedom from official, or one

[1] Art. i., 3 : 6. [2] *Id.*, 3 : 4, 5.

may say, personal bias would be violated. The Chief Justice presides,—an official of high rank, disinterested, save to be fair to all parties, and capable of so ruling. But when the Court of Impeachment sits to try other officials (except the Vice-President) the Chief Justice does not preside. When he presides and makes rulings they are not comparable to rulings or decisions he renders as the voice of the Supreme Court. The finding of the Court of Impeachment is not analogous to the decisions of that Court.

92. It follows therefore that the executive power of the United States, vested in the President, is not subject to the legislative or to the judicial power. It is independent of either or both. Yet the people of the United States have provided for their relief from a faithless execution of the office of President by combining Congress and the Chief Justice of the United States as a special body, or agency, a Court of Impeachment through which to secure relief.

93. It is evident that the power of the President of the United States is very great.

The scope of this executive power has never been realized [remarked President Hayes], and the practical use of power, even by an ordinarily strong President, is greater than the books ever described. The executive power is large because not defined in the Constitution. The real test has never come, because the Presidents,

down to the present, have been conservative, or what might be called conscientious, men, and have kept within limited range. And there is an unwritten law of usage that has come to regulate an average administration. But if a Napoleon ever became President, he would make the executive almost what he wished to make it.[1] Practically the President has the nation in his hands.[2]

94. The principle, difficult to understand, regulative of the constitutional law of the executive power, is the principle of executive as distinct from ministerial power.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in which respect to nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.[3]

This means that where the law requires the performance of a single specific act, there is no room for the exercise of judgment, there is nothing left to discretion; the act is ministerial. "Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed,—the duty thus imposed is in no sense ministerial; it is purely executive and political."[4]

[1] Notes of conversation, etc., C. E., Stevens, *Sources of the Constitution of the United States*, 169.

[2] *Id.*, 168.

[3] Mississippi v. Johnson, 4 Wallace, 475 (1866).

[4] *Idem.*

In application of this principle

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to cognizance.[1]

95. The principle applies alike to the States. The control of the exercise of powers belonging exclusively to the executive department of the government of a State can in no sense or degree be assumed by either of the other departments, as such control would amount to the performance of executive duties by the legislative or the judiciary, a confusion of functions distinctly forbidden by the constitution. And it has been decided that "*mandamus* will not issue to the Governor to compel the performance of *any* duty pertaining to his office, whether political or merely ministerial; whether commanded by the constitution or by some law passed on the subject."[2]

[1] Mississippi *v.* Johnson, 4 Wallace, 475 (1866).

[2] Many cases; see State *ex rel. v.* Stone, 120 Missouri, 428 (1894), in which most of the cases are cited. But *mandamus* will issue to an appointee of the executive, a ministerial officer, to perform a ministerial act. U. S. *ex rel.* Daly, 28 App. D. C., 552; 35 Wash. Law Rep., 81; Garfield *v.* U. S. *ex rel.* Frost, 30 App. D. C., 165; 35 Wash. Law Rep., 771; Griffin *v.* U. S., *ex rel.* Le Cuyer, 30 App. D. C., 291; 36 Wash. Law Rep., 103; Drake *v.* U. S., *ex rel.* Bates, 30 App. D. C., 312; 36 Wash. Law Rep., 140; U. S. *ex rel.* Newcomb Motor Co., 30 App. D. C., 464; 36 Wash. Law Rep., 150; also 36 Wash. Law Rep., 681. Also U. S. *ex rel. v.* Black, 128 U. S., 40 (1888).

The principle of American constitutional law as to executive and ministerial powers is thus stated:

The Court will not interfere by *mandamus* with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the Court having no appellate power for that purpose; but when they refuse to act in a case at all, or when by special statute, or otherwise, a more ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a *mandamus* may be issued to compel them.[1]

[1] United States *ex rel. v.* Black, 128 U. S., 40; and see the cases cited in preceding note.

NOTE—Hamilton in *The Federalist* makes the classic and earliest examination of the executive power,—Nos. lxvii.–lxxvi. Marshall's conception of the federal executive accords with Hamilton's. This conception is further developed in the decisions of the Supreme Court, in Marshall's time, concerning executive functions, and by Mr. Justice Story in his *Commentaries on the Constitution.* In *Political Science and Constitutional Law* (2 vols. 1891), John W. Burgess makes a critical and comparative study of executive power. J. H. Finley and J. F. Sanderson in their *The American Executive and Executive Methods* (1908), present the operation of executive power, State and federal, at the present time.

CHAPTER VIII

THE LAW OF JUDICIAL POWER

96. The people of the United States, like other sovereignties, possess not only legislative and executive functions, but also judicial. The possession of these three powers by sovereignty is essential to its existence and a condition of any conception of it. The judicial power of the United States is vested in one Supreme Court and in such inferior courts as Congress from time to time may ordain and establish. This is a delegation of judicial power.[1] The inferior courts are established by Congress but the power of these courts is delegated to them by the people of the United States through the Constitution. Thus it may be said that these inferior courts exist by act of Congress but their authority is delegated to them by the same sovereignty that empowers Congress to create them. The power of the Supreme Court is defined in the word *supreme*, and that of the inferior courts in the word *inferior*. Congress can neither increase nor decrease this

[1] Art. iii., 1 : 1.

power; the sovereign alone, the people of the United States can modify the grant. This it has done by the Eleventh Amendment, ratified in 1798:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.[1]

This Amendment was added in compliance with the idea,—at the time dominant in America,—that a State, a member of the Union, is a sovereign, and being sovereign, cannot be made defendant (that is, cannot be sued) at the suit of a citizen or subject of another State, or of a foreign country. The idea was,—and is,—that an American Commonwealth may be petitioned, like any other sovereign, but can be sued only in its own courts and with its own consent.[2] In conformity to this idea the Constitution was so amended as to deny to the courts of the United States any jurisdiction whatever in any case in which an American Commonwealth is made a defendant.

97. This Amendment is a limitation of the judicial power delegated to the government of the

[1] For the history of this amendment see the author's *Constitutional History of the United States*, ii., 264–290.

[2] See Iredell's dissenting opinion in Chisholm *v.* Georgia, 2 Dallas 419 (1793).

United States and save in some particulars of applied judicial jurisdiction as original or appellate, is the only limitation. On the principle that the government of the United States "must possess all the means and have a right to resort to all the methods of executing the powers with which it is intrusted that are possessed and exercised by the governments of the particular States,"[1] the judicial power vested in the federal courts must be sufficient for all the functions and purposes of the federal government. The judicial power of the United States extends to all cases, in law and equity, arising under the Constitution, the laws of the United States, and the treaties made under its authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States is a party; to controversies between two or more States; between citizens of different States; between citizens of the same State claiming lands under grants from different States, and between a State, or its citizens, and foreign states, citizens, or subjects, save and except as jurisdiction is limited by the Eleventh Amendment.[2]

98. It will be observed that the judicial power thus delegated to the United States includes jurisdiction over cases arising outside the domain strictly

[1] *The Federalist*, No. xvi.
[2] Art. iii., 2 : 1; Amendment XI.

included (as popularly understood) within the government of the United States. That government is, of necessity and by its nature, a distinct government, possessing powers and functions and purposes of its own, delegated and set forth in the Constitution. Fundamentally there is a government of the United States distinct from the government of the States. The judicial power of the United States includes jurisdiction over controversies to which States are a party,—that is, to controversies to which the United States is not a party. The jurisdiction here has no reference to the controversy but to the status of the parties to the controversy.

99. *The Federalist* sets forth the principle here involved:

> If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen (1787; forty-eight, 1917) independent courts of final jurisdiction over the same causes, is a hydra in government, from which nothing but contradiction and confusion can proceed.[1]

This aspect of the judicial power of the United States concerns the interpretation of the supreme law. One purpose of that law is "to insure domestic tranquillity,"—that is, the peace of the Union.[2]

[1] No. lxxx.

[2] *In re* Neagle, 135 U. S., 1 (1889).

The Constitution imposes restrictions on the States, which of course means restrictions on their legislatures, their governors, and their courts. Upon principles of good government the States are prohibited from doing many things. How shall infractions of the supreme law be determined? Either by a congressional negative, or by the authority of the federal courts overruling whatsoever act of the State contravenes the Constitution.[1]

100. But the judicial power of the United States extends yet further,—to controversies "in which the State tribunals cannot be supposed to be impartial and unbiased."[2] The principle here is that the whole is greater than a part;

that the peace of the whole ought not to be left at the disposal of a part. "No man ought to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."[3] On the principle that every government ought to possess the means of executing its own provisions by its own authority,

it follows that it is necessary that the construction of the Constitution,—the supreme law,—

should be committed to that tribunal which, having no local attachments, will be likely to be impartial between different States and their citizens, and which, owing its

[1] *The Federalist*, No. lxxx.

[2] *Id.* For example, were the Vice-President to preside over the Senate sitting as a Court of Impeachment.

[3] *The Federalist*, *id.*

official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.[1]

101. The exercise of judicial power by the Supreme Court is provided for, in part, by the Constitution, but Congress is authorized to ordain and establish inferior courts,—which means to define their respective jurisdictions; to bestow upon a court so much judicial power, and to make such restrictions, rules, and regulations as Congress itself may deem proper. Thus Congress establishes such courts and defines their several jurisdictions, but whatsoever judicial power a court possesses, by act of Congress, the court derives from the Constitution in its grant of such power. The jurisdiction of any inferior court of the United States, thus defined by Congress, may vary, from time to time, by act of Congress, but every case arising in the court must be shown, by the record of the court, to be within its jurisdiction.[2] The reason for this important rule (and seeming restriction) conforms to the essential principle in all judicial proceeding: the principle of authority. No court acts without authority and, as judicial examination has for its ultimate purpose the settlement of controversy in a legal manner, the jurisdiction of the court is of primary importance. One of the purposes of

[1] *The Federalist, id.*

[2] Robertson *v.* Cease, 97 U. S., 646.

the Union is "to establish justice," and precision in the whole matter of exercise of judicial power is essential.

102. The jurisdiction of the Supreme Court of the United States is both original and appellate. Its original jurisdiction is defined in the Constitution as "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party."[1] The Court can have original jurisdiction in no other cases, nor can Congress extend or diminish the Court's jurisdiction. Thus to the words in the Constitution conferring original jurisdiction on the Court "a negative or exclusive sense must be given, or they have no operation at all."[2] The original jurisdiction of the Supreme Court was conferred because of the dignity and rank of the Court, and the rank of the parties thus privileged to appear before it at first instance. Ambassadors, public ministers, and consuls represent sovereignties, and a State in the Union is "for some purposes sovereign, for some purposes subordinate."[3] On this delegation of original jurisdiction Chief Justice Marshall remarks: "There is, perhaps, no part of the article under consideration so much required by national policy as this."[4] The rank of the parties is the

[1] Art. iii., 2 : 2.
[2] Marbury *v.* Madison, 1 Cranch, 174.
[3] Cohens *v.* Virginia, 6 Wheaton, 414 (1821). [4] *Idem.*

reason for giving them the right to begin their case in the Supreme Court. They are not excluded from beginning it in some other court. But Congress, in establishing an inferior court, may deny to it any jurisdiction in cases to which foreign representatives are a party.[1] The right of ambassadors, public ministers, and consuls to begin their suits in the Supreme Court is a privilege accorded them because of their governments, and not because of themselves. As they are accredited to the Government of the United States and not to any State government, it is proper that the United States courts, and of these the Supreme Court, should have original jurisdiction in their cases.[2] In all the other cases mentioned in the Constitution the Supreme Court has appellate jurisdiction; that is, cases come before the Court on appeal from the decision of some inferior federal court, or from some State court, as provided by law. The entire procedure in an appeal to the Supreme Court is regulated by Congress. If a party, whether private person, private corporation, or public corporation, citizen, or State is within the jurisdiction of the United States, then that person or corporation, if a party to a case or controversy at law, is within the jurisdiction of a federal court. The Constitution

[1] So Congress has denied such jurisdiction to State courts,—Revised Statutes, U. S., Sec. 687.

[2] Davis *v.* Packard, 7 Peters, 276; Börs *v.* Preston, 111 U. S., 252 (1884).

is the supreme law of the land and this Constitution, the acts of Congress and the treaties made by its authority are the law of federal jurisdiction. Thus it is commonly and truly said, that whensoever the Constitution, or a treaty, or an act of Congress is involved in the controversy, the federal courts (as their several jurisdictions are determined by law) have jurisdiction in the case. The principle is one of sovereignty.

103. The State for some purposes retains its sovereignty,[1] as in the exercise of its police power.[2] By the Constitution, the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction," but the State has jurisdiction to punish crimes committed within its territory; to regulate fisheries within that territory, and to punish those who violate its regulations. The admiralty and maritime jurisdiction of the United States extends to the high seas, to the navigable waters of the United States, to the Great Lakes, and to rivers and lakes wholly within a State. Over its own territory the State has jurisdiction; thus the territory which is the scene, or area, or location of the act may be subject to both State and federal jurisdiction, and is always within one or the other.

[1] Cohens *v.* Virginia, *supra.*

[2] This power has been discussed in the preceding Chapters on Sovereignty, Legislation, Commerce, Taxation, Contracts, etc. See index.

104. In creating inferior courts, Congress determines the jurisdiction but not the judicial power exercisable within the jurisdiction. Congress does not control the judges in their execution of their office. Judicial power, of whatever extent, is conferred by the Constitution; it is power of a judicial nature delegated by the people of the United States. The inferior courts of the United States sit in the several States, but the right to determine the jurisdiction of these courts is placed not in the State Legislatures (though these Legislatures have by delegated authority, jurisdiction of this territory), but in the supreme judicial tribunal of the nation,—that is, in the Supreme Court of the United States.[1] This means that the Supreme Court "says what the law is." This is the peculiar office of courts of law. This is another way of saying that the sovereign, the people of the United States, has delegated to the Supreme Court and to inferior courts of the United States not legislative or executive but judicial powers. The courts of law exercise judicial powers as the President exercises executive and the Congress exercises legislative powers,—in order to accomplish the purposes set forth in the Preamble of the Constitution. The courts are empowered to accomplish this purpose only in a judicial way.

105. The inferior courts, established by Congress,

[1] Bank of Commerce *v.* New York City, 2 Black, 620 (1862).

have such jurisdiction as Congress in its wisdom sees fit to give them save that the jurisdiction belonging to the Supreme Court cannot be given to an inferior court; there can be but one Supreme Court. The relation of the State courts to the courts of the United States is partly determined by the Constitution, partly by act of Congress. The circumstances under which a case in or from a State court may be transferred, or appealed, to a federal court are various, but the essential reason for such transfer is that the jurisdiction of the United States as defined by the Constitution, a treaty, or an act of Congress, is involved. A case or controversy not involving that jurisdiction cannot arise in any federal court. The possible relations of the Constitution, treaties, and acts of Congress to individuals (persons natural), to corporations (persons artificial, as private corporations), and to States (public corporations), are beyond calculation. The line of demarcation between the jurisdiction of State courts and that of federal courts cannot be fixed by any brief definition or survey. In some instances the jurisdiction is a matter of choice by parties, the court that first takes jurisdiction having it, as it were, by first instance, but in such cases there exists by law a concurrent jurisdiction, judicial procedure being open to parties in either the State or the federal court. In practice, a court restricts itself to its own jurisdiction.

106. It has been said that one test of demarcation between the two jurisdictions is the common law; that each State has the common law but the United States has statute law only. This difference (if true) would restrict federal courts to an exercise of judicial power delegated by the Constitution and set forth in laws made by its authority, while the State courts would administer justice in accord with the law of the States which are both common law and statutory. It must be remembered, however, that federal courts sit in the several States and administer whatsoever law is the local (State) law, taking judicial notice of State statutes, of decisions of State courts, of usages, of the common law as existing in the State, and, therefore, exercising a jurisdiction essentially the same as the State courts. Emphasis may well be placed on the custom of federal courts to follow closely the decisions of State courts,—the result being that State decisions become final in federal courts as do federal decisions in State courts. But the States cannot increase or diminish the jurisdiction of federal courts, nor can Congress increase or diminish the jurisdiction of State courts. Although both courts may have jurisdiction in certain cases, collisions of authority are prevented by good sense and comity among State and federal judges.

107. The essential power of any federal court is

to exercise federal judicial jurisdiction. This means, practically, that a federal court does not and cannot exercise State powers. The converse also is true: no State court can exercise federal powers, unless granted those powers by the Constitution, a treaty, or an act of Congress; but a State court exercising any federal powers, is thereby a federal court. The Constitution provides that the judges in every State shall be bound by the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. This solemn oath of State judges to support the Constitution as the supreme law gives them jurisdiction "to say what the law is,"[1] and howsoever rarely they may exercise the power vested in them to do so, State judges may take judicial notice of any law, State or federal, as harmonizing or conflicting with the Constitution; this means that a State court may pronounce an act of Congress unconstitutional, but the decision of that court is not final: there is but one Supreme Court of the United States.[2]

108. Territorial courts are to be distinguished from courts of the United States. They are not federal courts as are the Supreme Court and the

[1] Marbury *v.* Madison, 1 Cranch, 137 (1803).

[2] The relation of the United States to the State judiciary; the subject of concurrent (State and federal) judicial jurisdiction, is examined by Hamilton in *The Federalist*, Nos. lxxviii–lxxxiii. See also Martin *v.* Hunter's Lessee, 1 Wheaton, 304 (1816).

inferior courts, namely, the Circuit Courts, the District Courts, or the Court of Claims. Neither are they State courts.

The Constitution being made only for the people of the United States,—that is, for the people of the United States inhabiting States,[1] does not apply or extend to the territories unless extended by act of Congress. The courts in a territory are created by Congress and have such powers (or jurisdiction) as the act creating them provides. But in creating them, Congress is limited by the Constitution.[2] Congress also creates courts martial, but the jurisdiction of these courts is always subject to inquiry by civil courts. Fundamentally, the reason here is the supremacy of the civil over the military authority in the American system of government.

109. A problem not infrequently arising in courts of law is the solution of some political question involved. All political questions are questions for the political department of the government to settle; they lie wholly outside of the jurisdiction of the courts. Thus the courts never decide as to the wisdom or folly of an executive or legislative act,—and in one form or another, every act of Congress or President is politically wise or unwise according to the political belief of the critic. Nor do the debates over an act fix the meaning of the act, with

[1] Hepburn *v.* Ellzey, 2 Cranch, 445 (1805). [2] Art. iii.

the court. Where the court was asked to refer to the debates in Congress to determine the meaning of the act, it was said:

All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein. There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.[1]

The reason, [continues the court], is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it passed.

110. In 1828 the Supreme Court sustained as a constitutional exercise of the war power the right of the United States to acquire territory by conquest or treaty.[2] The issue in the case was "the relation in which Florida (at the time a Territory) stands to the United States." It was an issue in law, not in

[1] United States *v.* Freight Association, 166 U. S., 290, citing many cases.

[2] American Insurance Company *v.* Cantor, 1 Peters, 542.

politics. Whether A or B is the lawful governor of a State is an issue, when legally drawn, for the State courts; but whether a community calling itself a State, is a member of the Union, or should be admitted into it, under the Fourth Article of the Constitution is a political question and is for Congress to decide.

It rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican form of government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.[1]

The right to decide such a political question is in Congress and not in the courts.[2]

111. The final authority of American courts of law to construe statutes and constitutions is distinctive. The court pronounces a law unconstitu-

[1] Luther *v.* Borden, 7 Howard, 1 (1848).

[2] The whole subject of the American judiciary is largely technical and can be known only through intimate knowledge of the *Reports*, of the *Statutes at Large*, and familiarity with *practice*. In the present chapter the *essentials of the law* of judicial procedure are the immediate subject.

tional and thus expounds the constitution. "This results," says Cooley, "from the nature of its jurisdiction." Chief Justice Marshall, in 1803, first applied this principle in a Federal court:

> The Government of the United States has been emphatically termed a government of laws and not of men. The Constitution is the supreme law of the land. *It is emphatically the province and duty of the judicial department to say what the law is.*[1]

In these words is stated the essential doctrine of judicial supremacy. As the doctrine is fundamental, the reason for it is essential to a proper understanding of its vast import:

> That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. . . . It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the Legislature may

[1] Marbury, *v.* Madison, 1 Cranch, 163.

alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming a fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the Legislature repugnant to the constitution is void. . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide the case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . . . Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which according to the

principles and theory of our government is entirely void, is yet in practice completely obligatory. . . . It would be giving the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions,—a written constitution,—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.[1]

The conclusion of the whole matter is:

Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.[2]

112. The federal (or the State) judiciary, while final judge of what the law is, is not the judge of what the law should be: such action would be a violation of judicial functions and an assumption of legislative functions.[3] The court in saying what the law is, that is, what it means, does not attempt to say what

[1] Marbury *v.* Madison, 1 Cranch, 176–180.

[2] All of Marshall's decisions rest on the principle, thus set forth, and it remains fundamental in America, applying alike in the States and in the United States.

[3] The principle is examined in State *ex rel. v.* Stone, 120 Missouri, 428 (1894). Also in Luther *v.* Borden, 7 Howard, 1 (1848).

the law should be, that is, to make the law. Therefore it is perilous, as likely to embarrass the court, for the court to be subject to the call of the executive, or the legislative, to give an opinion "upon important questions of law, and upon solemn occasions."[1] The peril lies in possible confusion of governmental functions, or, to use the constitutional term, "offices." The American people have delegated judicial power to the courts: the people of the several States to their State courts; the people of the United States, to the federal courts; and "it is emphatically the province and duty of the judicial department to say what the law is."

113. This province the American judiciary occupies, this duty it performs, with the result that it holds a unique place in political history. At no other time, among no other people, in no other form of government has the judiciary executed the office it executes in the American system of government.

It is the consciousness of the American people that law must rest upon justice and reason, that the constitution is a more ultimate formulation of the fundamental principles of justice and reason than mere legislative acts, and that the judiciary is a better interpreter of these fundamental principles than the Legislature,—it is this consciousness which has given such authority to the

[1] See Constitution of Massachusetts, Judiciary, III.

interpretation of the Constitution by the Supreme Court.[1]

Yet,—so remarks the Supreme Court itself,—

The slightest consideration of the nature, the character, the organization, and the powers of (federal) courts will dispel any fear of serious injury to the government at their hands. While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all. Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.[2]

114. To the question, "What is constitutional law in the United States?" the answer is, "Law as interpreted by the Supreme Court." In other countries, and, generally speaking, in all countries at all times, until the institution of the political

[1] *Political Science and Constitutional Law*, J. W. Burgess, ii., 365; "I do not hesitate to call the governmental system of the United States the aristocracy of the robe; and I do not hesitate to pronounce this the truest aristocracy for the purposes of government which the world has yet produced." *Id.*

[2] United States *v.* Lee, 106 U. S., 196 (1882).

system of the United States,—the American system of government,—the supreme law of the land was the will of the executive (as in absolute monarchies), or the supreme will of the legislative (as in Great Britain). So long as the Supreme Court of the United States retains the confidence of the American people, the decisions of that Court will remain the authoritative exposition of American constitutional law.

It follows that the normal execution of the judicial office in America determines the meaning of American constitutional law; or stated in other words, in the decisions of the Supreme Court there are found the formulation of the principles on which law in America is founded, and the application of these principles in testing, as issues arise, the acts of the legislative and the services of the administrative. Therefore it is to the interpretation thus given by the judiciary that we turn for an understanding of the exercise of offices,—legislative, executive, or judicial, delegated as powers by the sovereign, the people of the United States. Whatsoever is done, by either (so-called) department of government in conformity with this delegation of powers is constitutional; and whatsoever is done by either department in conflict with this delegation of powers is unconstitutional. Whether constitutional or unconstitutional it is the exalted and unique office of

the Supreme Court to determine. This Court therefore touches American life at every point. Exhaustive examination of its interpretation principles, laws, judicial decisions, arguments of counsel, opinions of experts, writings of jurists, and the history of society,—and such examination alone, answers the question, "What is constitutional law in America?"

In attempting, then, to summarize, the essentials of American constitutional law, it is from the decisions of the Supreme Court, as from no other source, one must derive any authoritative interpretation.

115. The three departments of government are distinct.

> The legislative shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the executive or legislative powers, or either of them; to the end it may be a government of laws and not of men.[1]

This principle of separation of powers, or offices, of government, is, for many purposes, not merely

[1] Case of Supervisors of Elections, 114 Mass., 247 (1873); the quotation (in the decision) is from the Constitution of Massachusetts, 1780, Part I, xxx. "The Government of the United States has been emphatically termed a government of laws, and not of men." Marbury *v.* Madison, 1 Cranch, 163.

fundamental, but primary, in American constitutional law. A department of government can execute only the offices, or powers, delegated to it,[1] but the Legislature cannot impose other than judicial duties upon courts of law, or judicial duties upon other than the judiciary.[2]

It follows from this principle that acts done by the legislative, or the judiciary, or the executive, in due course,—that is, according to rules of procedure and in the mode required by law, are official acts and are to be accredited as such.[3] Thus laws which appear on the face of them to be attested by the proper officials of the two Houses, duly signed by the Executive (or, passed over his vote as provided by the Constitution), and published by the official authorized to publish them are legislative acts, (laws) in a constitutional sense. So the records of courts of law made and kept in due procedure, and officially authenticated, are judicial records in a constitutional sense.

116. The original jurisdiction of the Supreme Court is co-extensive with the judicial power delegated by the Constitution.[4] Congress has power to give the inferior courts of the United States

[1] State *ex rel. v.* Simons, 32 Minn., 540 (1884). *Ex parte* Griffiths, 118 Indiana, 83 (1889).

[2] *Idem.*

[3] Harwood *v.* Wentforth, 162 U. S., 547 (1896).

[4] Osborn *v.* Bank of the United States, 9 Wheaton, 738 (1824).

"original jurisdiction in any case to which the appellate jurisdiction extends."[1]

In all cases in which the Constitution, or a treaty, or an act of Congress is involved, the United States through some one of its courts has jurisdiction.[2]

The exemption of an ambassador, public minister, or consul from suits in particular courts "is the privilege, not of the person who happens to fill the office, but of the State or government he represents."[3] Consuls are oftentimes citizens, not aliens; any exemptions or privileges claimed by such a person accrue to him as consul being an alien, not as consul being also a citizen, of the United States.

The admiralty jurisdiction of the United States extends over all water on which commerce is carried on between different States, or nations.[4] The principle of national commercial jurisdiction is essentially that of national political jurisdiction, a jurisdiction thus declared:

> We hold it to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and

[1] Osborn *v.* Bank of the United States, 9 Wheaton, 738 (1824).

[2] Many cases; see Southern Pacific Railroad Co. *v.* California, 118 U. S., 109 (1866); Beck *v.* Perkins, 139 U. S., 628 (1891).

[3] Börs *v.* Preston, 111 U. S., 252. (1884).

[4] The steamboat *Magnolia*, 20 Howard, 296 (1857).

functions that belong to it. This necessarily involves the power to command obedience to its laws. . . .[1]

It is a fundamental of our constitutional law that no suit can be maintained against the United States, in any court, without express authority of Congress; and the United States cannot be sued in the courts of any State in any case.[2] It is the sovereign right of the United States not to be sued. To the extent that a State is sovereign it has the same right, and "These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."[3] The physical boundaries of a State, constituting a political, not a judicial question, must be determined by legislative authority, yet if the United States is a party to a case involving the issue of territorial boundary, the case falls within the judicial power,—that is, within the jurisdiction of the courts of the Union.

The States of the Union have agreed in the Constitution that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws,

[1] *Ex parte* Siebold, 100 U. S., 37 (1879). Thus canals are highways of commerce and subject to "regulation" by Congress. The Robert W. Parsons, 191 U. S., 17 (1903); *Ex parte* Boyer, 109 U. S., 629 (1884).

[2] Stanley *v.* Schwalby, 162 U. S., 255 (1896), where the cases are cited.

[3] Cohens *v.* Virginia, 6 Wheaton, 414 (1821).

and treaties of the United States, without regard to the character of the parties (excluding of course, suits against a State by its own citizens, or by citizens or subjects of foreign states), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that (the Supreme Court) may exercise original jurisdiction in all such cases [in which a State shall be a party] without excluding those in which the United States may be the opposite party."[1]

In other words, the United States possesses adequate governmental authority and jurisdiction to secure the large purposes outlined in the Preamble to the Constitution. The United States has judicial jurisdiction in all cases arising under the Constitution, the laws and the treaties of the United States "whoever may be the parties."[2] This principle is of far-reaching effect; no party can be exempt.

117. A corporation created by a State is a citizen of that State for many purposes, but cannot be a citizen of another State because created by the former State. Outside of the State of its creation it is a foreign corporation and possesses only such privileges as are granted to it. This means that

[1] United States *v.* Texas, 143 U. S., 621 (1892). The doctrine also in South Dakota *v.* North Dakota, 192 U. S., 286 (1904).

[2] Ames *v.* Kansas, 111 U. S., 449 (1884); the "party" may be a State (including its corporate subdivisions), or a natural person (or persons), or an artificial person (a corporation).

rights, privileges, judgments accruing to or possessed by a corporation, say created by Pennsylvania and in Pennsylvania, do not accrue to and are not possessed by that corporation, say in Ohio, unless conferred by Ohio and possessed by the corporation within Ohio, under laws of Ohio, and by decision of Ohio courts. The principle here is the familiar one of jurisdiction. No State has power beyond its own jurisdiction and "the courts of no country execute the penal laws of another."[1]

The suability of a State involves its sovereignty and its honor and good faith. The constitutional law of America is that a State in the Union cannot be compelled to perform its contracts, although attempts on its part to avoid them may be judicially resisted, and State laws impairing the obligation of contracts are void. Yet the legislative department of a State represents its polity and its will and by every principle of justice is called upon to hold public obligations inviolate.

Any departure from this rule, except for reasons most cogent (of which the Legislature and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the Legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge

[1] Wisconsin *v.* Pelican Insurance Co., 127 U. S., 265 (1888).

the public debts, would be attended with greater evils than such failure can cause.[1]

118. The judicial power of the United States extends, under the Constitution to controversies between *citizens of different States* and the Judiciary Act confers jurisdiction strictly within the meaning of the term.[2]

States, as the word is used in the Constitution, means only members of the Union; a Territory is not a State; the citizen of a Territory is not a citizen of a State and any controversy at law which he may have with another person is not "a controversy between citizens of different States," and therefore does not come within the judicial jurisdiction of the

[1] Hans *v.* Louisiana, 134 U. S., 1 (1890). The history of the Eleventh Amendment includes the entire record as to suits against States. The principles involved may be found as discussed by Hamilton in *The Federalist*, No. lxxxi; by Marshall, Madison, Mason, and Henry, in the Virginia Ratifying Convention, 3 Elliott's Debates; in Mr. Justice Iredell's dissenting opinion in Chisholm *v.* Georgia, 2 Dallas, 419; and a special history of the Amendment in the author's *Constitutional History of the United States*, ii., 264–293. The Eleventh Amendment overruled the decision in the Chisholm case. As to suits against a State by its own citizens see Railroad Co. *v.* Tennessee, 101 U. S., 337 (1879). The principle here is that the sovereign may assent to being sued by its own citizens,—an assent declared by the State constitution, but available by the citizen only according to acts of the Legislature. The privilege (if it exists) is statutory. But suit against an officer, or agent of the State,—or of the United States, is not barred if that officer exercises a ministerial function; such suit is not a suit against the sovereign (United States, or State). See U. S. *v.* Lee, 106 U. S., 196 (1882); Cunningham *v.* Macon & Brunswick R. R. Co., 109 U. S., 446 (1883).

[2] Judiciary Act, 1789, 1888 (and so amended.)

United States. Of course the limitation applies to artificial persons,—corporations created by a State.

A corporation is not a citizen of the State and it cannot maintain a suit in a court of the United States against the citizen of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State.[1]

The jurisdiction of American courts is co-extensive with the power that creates them. Thus the jurisdiction of federal courts depends in no way upon the State, and State judges "possess an absolute independence of the United States."

The Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We (*i.e.* the Supreme Court) can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other

[1] The Ohio and Mississippi R. R. Co. *v.* Wheeler, 1 Black, 286 (1861). Hooe *v.* Jamieson, 166 U. S., 395 (1897).

reason than that which has been stated can be assigned, why some, at least, of these cases should not have been left to the cognizance of the State courts. In respect to the other enumerated cases—the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive legislation.[1]

From the principle here given it may be deduced that cases or controversies in State courts are removable from them into federal courts if the case or controversy involves the Constitution, a treaty or an act of Congress.[2]

But a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of *habeas corpus*, in advance of any proceedings in the courts of the State to test the validity of his arrest or detention.[3]

[1] Martin *v.* Hunter's Lessee, 1 Wheaton, 304 (1816); opinion by Mr. Justice Story; this case remains the leading case on the appellate jurisdiction of federal courts. The appellate jurisdiction of the courts is discussed by Marshall in Marbury *v.* Madison: "The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause," *Ex parte*, Watkins, 7 Peters, 568 (1833).

[2] Gaines *v.* Fuentes, 92 U. S., 10 (1875). Security Mutual Life Insurance Company *v.* Prewitt, 202 U. S., 246 (1906).

[3] Whitten *v.* Tomlinson, 160 U. S., 231 (1895). But as to conflicting jurisdiction of State and federal courts see Riggs *v.* Johnson County, 6 Wallace, 166 (1867).

119. A federal court sitting within a State is a court of that State within the meaning of the Constitution and laws of the Union, "and as such, has an equal right with the State courts to fix the construction of the local law."[1] A State tribunal's decision must conform to that of the Supreme Court of the United States, but a federal court sitting within a State follows the highest State tribunal unless the decision of that tribunal has been set aside by the Supreme Court. Such procedure "tends to preserve harmony in the exercise of the judicial power, in the State and federal tribunals." This means that the statute law of a State,—and a fixed and received construction by a State in its own courts, makes a part of the statute law,—is accepted by the federal courts sitting in the State. But the federal court there is not bound to follow such State precedents and authorities; the court possesses a jurisdiction independent of that conferred by State authority.[2] Thus it may be stated as accepted American constitutional law that where there are two co-ordinate jurisdictions, and especially "with regard to the law of real estate and the construction of State constitutions and statutes" and where are concerned "the doctrines of com-

[1] Green *v.* Neal's Lessee, 6 Peters, 291 (1832).

[2] *Idem.* The question is examined in Pana *v.* Bowler, 107 U. S., 529 (1882). Gelpoke *v.* City of Dubuque, 1 Wallace, 175 (1863).

mercial law and general jurisprudence" the federal courts sitting in a State exercise their own judgment, "but even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt."[1]

To the extent that a federal court sitting within a State follows State laws and decisions, to that extent is there a common law of the United States. There is, however, no national common or customary law of the United States; its law is statutory. But the interpretation of the Constitution by the judicial power of the United States

is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of (the Supreme) Court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.[2]

[1] Burgess *v.* Seligman, 107 U. S., 20 (1883). Bucher *v.* Cheshire R. R. Co., 125 U. S., 555 (1888).

[2] Smith *v.* Alabama, 124 U. S., 465 (1888). Western Union Telegraph Company *v.* Call Publishing Company, 181 U. S., 92 (1901).

NOTE: For an account of acts of Congress declared unconstitutional by the Supreme Court see *The Supreme Court and Unconstitutional Legislation*, B. F. Moore, Columbia University Studies, vol. liv., No. 2, 1913.

CHAPTER IX

THE LAW OF STATE COMITY, TERRITORIES AND POSSESSIONS

120. The States comprising the Union possess equal powers and are subject to the same limitations. This means, in brief, that they have, respectively, the same jurisdiction. The sovereignty of one State is equal to the sovereignty of another. Because of this equality, they are all subject to the same rules of State comity. The aspects of this mutual equality are numerous and are the subject of provisions of the Constitution.[1]

In so far as a State possesses jurisdiction it may exercise authority.[2] This rule is fundamental in American constitutional law. The Constitution of the United States confers no new power of jurisdiction by simply regulating the effect of the acknowledged jurisdiction over persons and things within a

[1] Art. i., 8: 17; 9: 6, 8; 10: 1, 2, 3; Art. iii., 2: 1, 2, 3; Art. iv., 1 : 1; 2: 1, 2, 3; 3: 1, 2; 4: 1; Art. v., Art. vi., 2, 3; Art. vii., 1; Amendments VI., X., XI., XIII., XIV., XV., XVI., XVII.

[2] Thompson *v.* Whitman, 18 Wallace, 457 (1873).

State.[1] Thus a State cannot make its law valid in another State; the validity of a State law depends upon the will of the State in which the validity is claimed. From this it follows that "the jurisdiction of any (State) court exercising authority over a subject (*i. e.*, persons or property) may be inquired into in every other (State) court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings."[2]

So, despite the fourth article of the Constitution as to "full faith and credit," and "public acts, records, and judicial proceedings" in the several States, "a judgment rendered in any State may be questioned in a collateral proceeding in another State."[3]

121. This principle is disclosed by examination of the States as civil and political entities, for:

> It is equally well settled that the several States of the Union are to be considered in this respect as foreign to each other, and that the courts of one State are not presumed to know, and therefore, not bound to take judicial notice of the laws of another State.[4]

[1] McElmayle *v.* Cohen, 13 Peters, 312. Story, *Commentaries on the Constitution*, 1313.

[2] Williamson *v.* Berry, 8 Howard, 540.

[3] Thompson *v.* Whitman, 18 Wallace, 457.

[4] Hanley *v.* Donaghue, 116 U. S., 1 (1885).

Therefore, whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved, like any other fact.[1]

But national courts are bound to take notice without proof of the laws of each of the States.[2] The principle is thus laid down by Chief Justice Marshall: "The laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts."[3] For national purposes embraced by the Constitution, the States and their citizens are one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign to and independent of each other,—their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions.[4] In government, jurisdiction is co-extensive with sovereignty. Faith, credit, public acts, records, or judicial proceedings that are valid in a State are, when

[1] Hanley *v.* Donaghue, 116 U. S., 1 (1885).

[2] *Idem.*

[3] Talbot *v.* Seeman, 1 Cranch, 38 (1801). The principle here declared is not to be applied strictly in extradition cases, whether between the several States or between the United States and another notion.

[4] Buckner *v.* Finley, 2 Peters, 590 (1829).

proved, valid in every other State, and Congress possesses the power to prescribe by general laws the manner and the effect of proof. This supreme power is incidental, as well as necessary, to national sovereignty as realized in "the more perfect Union."[1]

122. The citizens of each State are entitled to all privileges and immunities of citizens in the several States.[2] But a corporation is not a citizen, being but an artificial person created by the Legislature and possessing only the powers and attributes which the Legislature has prescribed.[3] This conclusion is inevitable from the principle of jurisdiction. No State can create or give powers to a corporation in another State, or powers that will be valid there. A corporation created by a Legislature has powers and privileges only within the jurisdiction of that Legislature; or, as is said: "The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created."[4] Thus a State may admit or exclude foreign corporations, and the corporation cannot maintain a claim of citizenship to right to enter the State.

123. The words "privileges and immunities of citizens" are of comprehensive meaning as deter-

[1] Buckner *v.* Finley, 2 Peters, 590 (1829).
[2] Art. iii., 2: 1.
[3] Paul *v.* Virginia, 8 Wallace, 168 (1868). [4] *Idem.*

mined by the courts from time to time as issues (cases or controversies) come before them. The clause in the Constitution

plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of enjoying in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.[1]

Or, as the principle is further stated: the sole purpose of the constitutional provision is

to declare to the several States, that whatever those rights (*i. e.*, the rights of citizens of that State),—as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your own jurisdiction.[2]

But the citizen from another State must comply with the laws of the State into which he comes before he can have the protection of its sovereignty.

The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of

[1] Ward *v.* Maryland, 12 Wallace, 418.

[2] Slaughter House Cases, 16 Wallace, 77 (1872). Blake *v.* McClung, 172 U. S., 239 (1898).

alienage when he is within, or when he removes to, another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established.[1]

124. The test here is jurisdiction. No State has jurisdiction that is denied it by the Constitution of the United States. Each State has power so far as its jurisdiction, or sovereignty, extends, to declare what shall be offences against its laws, and citizens of other States within its jurisdiction are subject to those laws.[2]

Fugitives from justice escaping from a State or Territory to another are subject to extradition.[3] Upon the Executive of the State or Territory in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. It is within the jurisdiction of the State or Territory into which the accused has fled to demand competent proof that he is in fact a fugitive from the demanding State; otherwise the jurisdiction of the demanding State would extend over the State or Territory into which the accused has fled. But such proof being

[1] Blake *v.* McClung, *supra.*

[2] *Ex parte* Reggel, 114 U. S., 642 (1885). Pennoyer *v.* Neff, 95 U. S., 714 (1877).

[3] Art. iv., 2: 2. Revised Statutes, §§ 5278, 5279.

established, the accused "shall be delivered up" as the federal Constitution prescribes.[1] The principle here is that of State jurisdiction as limited by the supreme law.

125. But the question of powers, or rights, by extradition, raises the question of right of asylum. Do

> the States of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties, on that subject; and, in the further assumption that a fugitive from justice acquires in the State to which he may flee some State or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another State, unless such crime is made the special object or ground of his rendition?[2]

To answer this question in the affirmative is to violate the sole object of the Constitution and acts of Congress concerning the surrender of fugitives from justice. Foreign nations stand in treaty relations with the United States and with each other. The States composing the American Union do not stand, and by the Constitution, cannot stand in treaty relations with one another or with any other State or power.[3]

[1] *Ex parte* Reggel, *supra*.
[2] Lascelles *v.* Georgia, 148 U. S., 537 (1893).
[3] Art. i., 10: 1.

126. A fugitive from a foreign nation seeking refuge in the United States is not extraditable unless by the terms of the treaty between that nation and the United States. There is nothing in the Constitution, or in the Statutes at large of the United States in reference to interstate rendition of fugitives from justice which can be regarded as establishing any compact between the States of the Union (such as a treaty between the United States and another nation does or may contain), limiting their operation to particular or designated offenses. And it is questionable whether the States, or any of them, could constitutionally enter into any agreement or stipulation one with another for the purpose of defining or limiting the offenses for which fugitives would or should be surrendered. "The plain answer is that the laws of the United States do not recognize any right of asylum on the part of the fugitive from justice in any State to which he has fled."[1] The principle here laid down finds further explication: To apply the rule of international, or foreign extradition to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles.[2] In the former, the extradition depends upon treaty contract, or stipula-

[1] Lascelles *v.* Georgia, *supra.* In international law the right of extradition does not include fugitives for *political* offenses. This exemption is an incident of sovereignty.

[2] Consult United States *v.* Rauscher, 119 U. S., 407.

tion, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by nature of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions, or limitations, upon the jurisdiction and authority of the State to which the fugitive is returned.[1]

127. The decision as to whether a State possesses a republican form of government,—or what government in a State is the lawful government rests with the political, not the judicial power. "It is the province of the court to expound the law, not to make it."[2] Thus the courts follow the political authority.

In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice; and this principle has been applied, by the act of Congress, to the sovereign States of the Union.[3]

If the President errs, it is within the power of Congress to apply the proper remedy. "The sovereignty

[1] Lascelles *v.* Georgia, *supra.*
[2] Luther *v.* Borden, 7 Howard, 1 (1848). [3] *Idem.*

in every State resides in the people of that State, and they may alter and change their form of government at their own pleasure."[1] But the United States guarantees to each a republican form of government.[2] "No particular government is designated as republican, neither is the exact form to be guaranteed in any manner especially designated."[3]

The guarantee necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term, as employed in the Constitution.[4]

Conformably with the character of this federal guarantee of the republican form, the Supreme Court has decided that:

In the Constitution the term *State* most frequently expresses the combined idea . . . of people, territory, and government. A *State*, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and or-

[1] Luther *v.* Borden, 7 Howard, 1 (1848).
[2] Art. iv., 4: 1.
[3] Minor *v.* Happersett, 21 Wallace, 162 (1874).
[4] *Idem.*

ganized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States, under a common Constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States, which compose it, one people and one country. . . . The preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all of its provisions, looks to an indestructible Union of indestructible States.[1]

The constitutional rules of State comity are therefore rules of national jurisdiction, and operate as limitations on the jurisdiction of the several States. The purpose of these rules, as that of every rule of that jurisdiction is essentially to preserve that jurisdiction, or sovereignty,—and is sufficiently indicated in the Preamble to the Constitution.[2]

128. The admission of a new State into the Union is a political act exclusively within the power of Congress, save that no new State shall be erected within the jurisdiction, or by the conjunction, of States or parts of States, without the consent of the

[1] Texas *v.* White, 7 Wallace, 700 (1868).

[2] There are many cases expository of this principle: McCulloch *v.* Maryland, 4 Wheaton, 316; Barron *v.* Baltimore, 7 Peters, 243; Slaughter House Cases, 16 Wallace, 36; United States *v.* Cruikshank, 92 U. S., 542; *Ex parte* Siebold, 100 U. S., 371; Fong Yue Ting *v.* U. S., 149 U. S., 698; Legal Tender Cases, 12 Wallace, 457.

Legislatures of the States concerned, as well as of Congress.[1] This entire act is exclusively political, but the State once admitted into the Union comes within the jurisdiction of the United States as the Constitution provides.[2] The State thus admitted becomes entitled to and possesses all rights of sovereignty and dominion,—that is, rights of jurisdiction, which belonged to the original States.[3]

129. The act enabling the inhabitants of a Territory to adopt a constitution and become a State in the Union usually prescribes that the proposed constitution and government shall be republican in form, shall make no distinction in civil or political rights on account of race or color, shall not be repugnant to the Constitution of the United States, or to the principles of the Declaration of Independence, and shall comply with such conditions as Congress at the time may propose.[4] On June 16, 1906,

[1] Art. iv., 3: 1.

[2] Art. iii.; Art iv. § 10; Amendments VI., X., XI., XIII., XIV., XV., XVII., and doubtless also in the matter of federal elections (election of members of the House of Representatives, and of United States Senators) as by Wiley *v.* Sinkler, 179 U. S., 58; *Ex parte* Yarbrough, 110 U. S., 651, and in all other Federal relations.

[3] Sands *v.* Manistee Improvement Company, 123 U. S., 288 (1887).

[4] If admitted by Proclamation of the President (and so Congress may provide) conformity to conditions imposed is duly announced by him. The enabling acts since 1789 vary in content. They are reprinted in *The Federal and State Constitutions, Colonial Charters,* and other *Organic Laws of the States, Territories and Colonies Forming the United States of America.* 7 vols. Washington, Government Printing Office 1909.

Congress passed an enabling act under which, four years later, Arizona sought admission into the Union. The new constitution submitted to Congress provided for state-wide recall of State officials. To this provision Congress objected and made the admission of the Territory conditional upon the amendment of its proposed constitution by eliminating the objectionable provision. Arizona complied with the congressional condition and was admitted; thereupon speedily amended its constitution by re-inserting the objectionable clauses. Congress has no power to impose conditions, clauses, or provisions upon the constitution of a State; yet, a provision of a State constitution in conflict with the Constitution of the United States is null and void.[1]

130. As the Union is an indestructible Union of indestructible States, it is a principle of American constitutional law: once a State, always a State. The inhabitants of a Territory having been erected by Congress into inhabitants of a State, territorial jurisdiction, created by act of Congress ceases, and State jurisdiction exists. It is this State jurisdiction in the Union which is indestructible, which can

[1] The provision of the Ohio constitution of 1912 limiting the right to vote to "white male citizens of the United States" (Ohio, Art. v., § 1) citizens with the Fifteenth Amendment of the national Constitution. The power of the Judiciary of the United States to declare constitutions and laws that are repugnant to the Constitution of the United States unconstitutional, null, and void is discussed in the preceding chapter.

neither be extended, nor diminished by Congress. The equality and equivalency of the States in the Union is a fundamental in American constitutional law. The jurisdiction of a Territory differs from that of a State as a governed differs from a self-governing community.

131. Congress has power "to make all needful rules and regulations respecting the territory and other property belonging to the United States."[1] This means the power to govern, a power necessary to sovereignty, and the "inevitable consequence of the right to acquire territory; or, as the jurisdiction over a Territory does not belong to any State in the Union, its government lies by implication (if not by necessity) with the United States.[2]

In creating a territorial jurisdiction, Congress exercises, but does not part with its powers. The power to govern Territories is not conditioned. Such Territories

are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law ("enabling act") for a Territory takes the place of a constitution as the fundamental law of the

[1] Art. iv., 3: 2.

[2] American Insurance Company *v.* Canter, 1 Peters, 551 (1828). National Bank *v.* County of Yankton, 101 U. S., 129 (1879).

local government. It is obligatory on, and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly, or by implication reserved in the prohibitions of the Constitution.[1]

132. Congress has full and complete legislative authority over the people of the Territories, and all departments of the territorial government. It may do for the Territories what the people under the Constitution of the United States may do for the States. That the Supreme Court in 1901 gave a new meaning to the jurisdiction of Congress over territory belonging to the United States is now a matter of history. By that decision the power to govern is co-extensive with the power to acquire territory,—and this means sovereignty. Territorial acquisitions are wholly subject to the will of Congress. It may govern them as it sees fit. States, not Territories, are guaranteed by the United States "a republican form of government." The word "citizens" as used in the Constitution does not include inhabitants of such Territories.[2]

[1] National Bank *v.* County of Yankton, *supra.* But all rights commonly known as *fundamental* do not work as limitations of the power of Congress to govern Territories or "outlying possessions"; see Downes *v.* Bidwell, 182 U. S., 244 (1901). Until this decision these *fundamental* rights were construed as *limitations* of the power of Congress in its government of Territories; see Callan *v.* Wilson, 127 U. S., 540 (1888). Thompson *v.* Utah, 170 U. S., 343 (1898).

[2] Downes *v.* Bidwell, *supra,* and supporting cases.

The Constitution of the United States was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument.[1]

But the government thus formed under the Constitution is the government of "the more perfect Union," which is an "indestructible Union of indestructible States." By constitutional law, indestructibility is not a quality of any territory under the jurisdiction of the United States.

133. The rights of the inhabitants of such territory are determined by Congress. This power of Congress seems unlimited, but the Supreme Court of the United States disclaims "any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no

[1] Barron *v.* Baltimore, 7 Peters, 243 (1833).

rights which it is bound to respect."[1] What limitation then, if any, is there on Congress, in exercising its powers over such territory?

The Court replies:

> There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect to secure dependencies against legislation manifestly hostile to their real interests.[2]

But the power of Congress to govern Territories, ("dependencies," "outlying possessions") is, by present constitutional law, exercisable at the will of Congress.[3] The essential matter is of jurisdiction. The United States is a sovereignty; for some purposes the several States comprising the Union are sovereign,[4] but according to American constitutional law, a Territory, dependency, or outlying possession belonging to the United States is not sovereign, and possesses no powers, rights, privileges, or attributes of sovereignty. The principle may be stated thus:

[1] Downes *v.* Bidwell, *supra.*

[2] *Idem.* In Brown *v.* Walker, 161 U. S., 591 (1896), (*i. e.*, five years before the decision in Downes *v.* Bidwell), the Court declared: "The object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, etc."

[3] The dissenting opinions in Downes *v.* Bidwell should be read; powerful as they are, they are *not* the opinion of the Court and *do not declare what the law is.*

[4] Cohens *v.* Virginia, 6 Wheaton, 414 (1821).

To whatsoever extent Congress exercises jurisdiction, to that extent it governs; its functions are legislative and essentially political; to the extent that they are political they are sovereign.[1]

[1] The power of Congress over territory incorporated into the United States,—that is, over territory over which the Constitution has been extended by Congress is limited by the Constitution: Thompson *v.* Utah, 170 U. S., 343 (1898). Rasmussen *v.* United States, 197 U. S., 516 (1905); but over territory *not so incorporated*, see Hawaii *v.* Mankichi, 190 U. S., 197 (1903); Dorr *v.* U. S., 195 U. S., 138 (1904). The decisions support the doctrine that once the Constitution has been extended over territory, it cannot be withdrawn (Downes *v.* Bidwell) and consequently, all the limitations which by the Constitution affect Congress operate as limitations of its power over the territory, and therefore operate as fundamental rights and privileges of the inhabitants of such territory.

CHAPTER X

THE LAW OF LIMITATIONS

134. The government of the United States, as also that of each State, is a government of limited powers. In our day we speak of either government as one of *limitations;* in the eighteenth century the equivalent expression was "checks and balances."[1] Fundamentally, American constitutional law is the law of constitutional limitations. These limitations confront us at whatever point we consider American law and government. Sovereignty,—the people of the United States, or the people of a State,—has never delegated all its powers to government, and never any of them without limitations.[2] Written constitutions are limitations of delegated powers. But powers delegated to what we commonly call a department,—as the legislative, the executive, or the judicial,—are sufficient for the necessary and proper performance of the functions (or as constitutional law would say, "execution of the office")

[1] So throughout *The Federalist,* and notably in Nos. xliv., xlv., li.

[2] But note the Sixteenth Amendment.

of the department. This concept of the nature of the grant of powers is fundamental; on no other concept of power can government in America be operated.

It remains then to know the scope and character of these checks and balances, — these limitations,—which, however obscure, distinguish constitutional law and government in America. In the federal system, the government of the United States is balanced against that of the States, the office, or function of the one, operating as a limitation on the office or function of the other. This, unquestionably, is the essential, or principal limitation in the American civil system. It discloses itself in the frequent question whether a public service shall be done by the United States or by the State,— touching such matters as public health, public safety, public morals, commerce, labor, and others. Here there always is the question of authority, whether it is State or federal, and, if any, to what extent? And if there is limitation, is it of State authority by federal, or of federal authority by State,—or, is it of both by fundamental limitations?

Passing the mutual limitation of the two governments, we come to limitations of each, and these limitations are similar. Powers of the Senate counterbalance powers of the House; powers of the Legislative counterbalance those of the Executive; powers of the

Judicial counterbalance powers of the Executive and the Legislative. If the President nominates, the Senate may refuse to conform; if he negotiates a treaty, the Senate may refuse to ratify it. If President or federal Judge fails to execute his office, the House may impeach, and the Senate convict of "high crimes and misdemeanors." If members of Senate or House fail to satisfy their constituents, these may elect other men as their successors. No office in the American system of government is for life, though it may be for good behavior. Lincoln states the whole case:

> By the frame of government under which we live, this same people have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that little into their own hands at very short intervals. While the people retain their virtue and vigilance, no administration by any extreme of wickedness or folly, can very seriously injure the government in the short space of four years.[1]

135. Of checks on the Executive there are three: concerning his election; concerning his powers, or office, and concerning his removal from office. He is elected by a few persons, technically called "electors."[2] Each State appointing as its Legislature may direct as many "electors" as the whole number of its Senators and Representatives to which it is

[1] First Inaugural. *Works* (Century Ed.), ii., 7.
[2] Art. ii., 1 : 2; Amendment XII.

entitled in Congress. Popular election of these "electors" is, in constitutional law, their appointment by the State legislatures. The so-called popular vote is unknown to the Constitution.[1]

The method of deciding disputed presidential elections, provided in the Constitution, was modified by adoption of the Twelfth Amendment in 1804. The Amendment means that if the decision is not made by the presidential electors by a certain time, the election shall go to the House of Representatives, in case of the President; and to the Senate, in case of the Vice-President. The vote in the House is by States; the Senators represent States. Thus the States, at a critical time, become the check on the United States in the selection of President and Vice-President.

That the President (and by implication, the Vice-President) must be native-born American citizens is a constitutional limitation of candidacy.

136. Of limitation of executive powers, the

[1] In 1787 distrust of the people, among the framers of the Constitution, explains the constitutional provision. James Wilson urged election of the President by popular vote. South Carolina in 1860 was the last State to appoint presidential electors by its Legislature. There is widespread belief in America now that the President should be elected by direct popular vote, as are Congressmen and United States Senators. At present the "electoral vote" is 531; the person receiving the majority of these 531 votes is President of the United States. By American laws there are upwards of 20,000,000 voters; by American constitutional law, the person receiving 266 "electoral" votes is President.

exception of the pardoning power in cases of impeachment, and of command of the State militia save when called into the actual service of the United States[1] are specified,—or, as commonly stated in legal language,—"expressed," not "implied." So too is the limitation of the President's appointing power during recess of the Senate,—the appointee's commission expiring "at the end of the next session."[2] What limitations of executive power are implied in the Constitution is largely a matter of political interpretation. The practical question here is of confusion of functions, or offices. Thus the Executive may not exercise legislative or judicial functions. This conforms to the theory of separation of governmental functions expressed or implied in every American constitution.

Yet Congress may impose duties upon the President which are essentially legislative, as, for example, by empowering him to suspend, by proclamation, the collection of duties on articles from a nation which, by reciprocity, has suspended collection of duties on certain imports from the United States. Does the President in such a case transcend executive office?

The true distinction is between the delegation of power to make the law, which necessarily involves a

[1] Art. ii., 2 : 1. [2] *Id.* 3.

discretion as to what it shall be,—and conferring authority, or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[1]

A very large proportion of the bills presented to Congress originate in the executive department. But Judge Ranney's distinction (stated above) expresses the essential difference: it is Congress that determines what the law shall be. The bill, or measure, proposed, may come from a private citizen, or a State Legislature, or a railroad directorate, or the War Department, or a Committee of the House, or from some other source: it is Congress alone that can make it law. There is, however, a powerful check on the Executive as suggesting legislation: the check of public opinion, of custom, of precedent. These and like checks are sometimes called the limitations of the unwritten constitution.

137. The third check on the Executive is of removal from office for cause, by impeachment, in which procedure the House, the Senate, and the Chief Justice of the United States have definite offices.[2] Practically this check is utilized on political

[1] Cincinnati, Wilmington, etc., R. R. Co. *v.* Commissioners, 1 Ohio St., 88; and see a full discussion of the issue in Field *v.* Clark, 143 U. S., 649 (1892).

Thus technically, the veto power is not a legislative but an executive power, though it is common to speak of the participation of the executive in legislation.

[2] Art. i., 2 : 5; 3 : 6. The subject is discussed in Chapters VII and VIII.

grounds; therefore it cannot be measured strictly as a process in law, although it is under a procedure distinctively in constitutional law. The check on the election of the Executive is essentially political, but that on the pardoning power, and on the command of the State militia is not political: yet all these checks, or limitations, are constitutional.

138. The constitutional limitations of the power of Congress,—checks on federal legislative power,—include term of service, qualifications for office, and authority in legislation. The large limitation is of term of service: six years for Senators; two years for Representatives. The people of the United States delegate legislative powers to Congress for a limited time. In an absolute monarchy there is no legislative, nor is there a time limit on the monarch as law-maker. Lincoln touched the vital spot when he said that the people have given their public servants but little power for mischief, having provided for the return into their own hands at very short intervals what little power they have delegated. Were Congress a corporation, with perpetual charter, and filling vacancies in its membership, it would, for practical purposes, exercise the office of sovereignty and would exercise power without limitation. The delegation of legislative power by the people of the United States is not to Senators or to Representatives, but to Congress, consisting of a Senate and a House

of Representatives, and organized and proceeding according to the Constitution. The question in America is not alone, What will Congress do? but also, What can Congress do?

139. The expressed limitations of the power of Congress are that

(1) All duties, imposts, and excises shall be uniform throughout the United States.[1]

(2) No appropriations of money to raise and support armies shall be for a longer period than two years.[2]

(3) Militia officers must be appointed by the respective States.[3]

(4) No bill of attainder or *ex post facto* law shall be passed.[4]

(5) No tax or duty shall be laid on exports from any State.[5]

(6) No discrimination shall be made as to ports of entry or the regulation of shipping.[6]

[1] Art. i., 8 : 1.

[2] *Id.*, 8 : 12. In practice appropriations are for one year; if the purpose for which the appropriation was made is not effected within the year, the appropriation ceases to be available, unless to the contrary as declared in the law; but an unexpended appropriation may be made available (sometimes) by resolution of Congress, or even of the branch of Congress specially concerned.

[3] Art. i., 8 : 16.

[4] *Id.*, 9 : 3. The limitation as to prohibition of the slave trade was temporary. *Id.*, 9 : 1.

[5] *Id.*, 9 : 5.

[6] *Id.*, 9 : 6.

(7) No title of nobility shall be granted by the United States.[1]

(8) Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.[2]

(9) Revenue bills shall originate in the House of Representatives.[3]

(10) No Senator or Representative, during the time for which he is elected, can be appointed to any civil office under the United States, which shall have been created, or the emoluments of which shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.[4]

(11) No act of Congress concerning treason can provide for conviction "unless on the testimony of two witnesses to the same overt act, or on confession in open court."[5]

(12) A bill of attainder of treason is not a bill of attainder, but no bill of attainder of treason shall

[1] Art. i., 9 : 8. [2] *Id.*, 5 : 4. [3] *Id.*, 7 : 1.

[4] *Id.*, 6 : 2. This is a limitation of the freedom of choice of certain individuals rather than a limitation of Congress as a legislative body; but what is forbidden to a member of Congress cannot be made lawful for him by act of Congress; thus the limitation may be one of legislation. The provision (Art. i., 9 : 2) concerning the suspension of the writ of *habeas corpus* is not a limitation of the power of Congress, for Congress is the judge whether public safety requires the suspension of the writ.

[5] Art. iii., 3 : 1, 2.

work corruption of blood, or forfeiture except during the life of the person attained.[1]

(13) A new State cannot be erected within the jurisdiction of another State, or be formed by the junction of two or more States, or parts of States, without consent of their respective legislatures.[2]

(14) The power of Congress to make rules and regulations respecting the territory or other property belonging to the United States cannot be exercised so as to prejudice the claims of any particular State.[3]

140. While the limitations thus far cited are specific and expressed, they go less to the fundamentals of government and civil rights than do other limitations expressed in the Constitution, and notably in the Amendments.[4]

It is not unusual that a State constitution declares that to guard against transgressions of the high powers of government delegated by the people through them, everything in the article, commonly known as the Bill of Rights, is excepted out of the general powers of government, and shall forever remain inviolate. The first ten Amendments of the Constitution are its Bill of Rights, and are a limitation not only of legislative powers but also of

[1] Art. iii., 3:2; *Id.* i., 9:3.

[2] *Id.* iv., 3:1. [3] *Id.*, 3 : 2.

[4] The first ten Amendments were demanded in 1787–8 as specific limitations of legislative power of the United States, and as a protection of fundamental, original rights of the people.

executive powers vested in the President, and of judicial powers vested in the Supreme and inferior courts of the United States.[1]

As respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging freedom of speech or the press, or the right of the people peaceably to assemble and to petition to government for a redress of grievances, Congress can make no law whatever.[2]

Nor can Congress infringe the right of the people to keep and bear arms, or violate their right to be secure in their persons, houses, papers, and effects, or pass any law holding a person to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in the actual service of the United States in time of war, or public danger; or pass any law compelling any person to be subject for the same offence twice to be put in jeopardy of life or limb, or be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; or pass any law taking private property for public use without just compensation.[3]

The practical effect of the limitations expressed

[1] The history of these Amendments in the author's *Constitutional History of the United States*, ii., 199–263.

[2] First Amendment.

[3] Amendments II., III., IV., V.

in the Fifth Amendment can be known only by judicial interpretation, and decision of cases instituted under it; no theoretical definition can anticipate these decisions of the Supreme Court. The principle involved is the protection of certain fundamental rights of the people. In a similar manner do the Sixth, Seventh, and Eighth Amendments guard fundamental rights and limit the legislative power delegated to Congress by the people of the United States. This means that Congress has no power to deny or to disparage rights enumerated in these Amendments which are, as a group, enumerative of rights at common law. Nor are the rights enumerated, or set forth, in the Constitution as (practically) excepted out of the powers of government, and forever inviolate, the only rights which Congress, in exercising its powers, is inhibited from violating. Other and unmentioned rights of the people are distinctly implied,[1] as retained by them, and the Tenth Amendment is a general limitation of Congress, President, and Courts, for it declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[2]

141. The line of demarcation between powers

[1] See the Ninth Amendment.

[2] It will be noticed that this Amendment is not a limitation of the States; it applies to the United States.

delegated and powers reserved has always been, and doubtless always will be, in dispute. The question involved is political as well as constitutional. The abolition of slavery by the Thirteenth Amendment excludes pro-slavery legislation of any kind affecting the United States or any place subject to its jurisdiction. In like manner the Fourteenth Amendment forbids Congress, or any State, to assume or pay any debt, or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave. All these limitations of legislative power are practical guides and measurements by which the judicial power,—the law courts,—can determine what the law is, whether the act of Congress conflicts with the Constitution. It is largely through these expressed limitations that the judiciary becomes a check on the legislative.[1]

142. The limitations of the powers of the States are numerous and specific. As to limitations of State power (*i. e.*, the power of the State government, executive, legislative, judicial, administrative), within State jurisdiction, the several State constitutions alone are authoritative and final.[2] The Union is an

[1] This is brought out by Marshall in Marbury *v.* Madison, 1 Cranch, 137,—the corner-stone of many later decisions.

[2] The limitations of the States by the Constitution of the United States have already been discussed in earlier chapters. Examination of present State constitutions will disclose existing limitations prescribed by the sovereignty, the people of the State.

indestructible Union of indestructible States, yet the States composing the Union are under limitations as members of that Union. Except as to the places of choosing senators, Congress may at any time prescribe the times, places, and manner of holding elections of senators and representatives.[1]

Congress has exclusive jurisdiction over the District of Columbia, and over places purchased from any State, and over federal property.[2]

But the Constitution enumerates limitations of the States, each of which eliminates sovereignty from the State and all together, with some other limitations, reduce a State to what Hamilton, in *The Federalist* calls "residuary sovereignty."[3]

No State shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto*, law, or law impairing the obligation of contracts, or grant any title of nobility.[4]

[1] Art. i., 4 : 1. The right to vote for members of Congress has its foundation in the Constitution of the United States, not in that of any State: Wiley *v.* Sinkler, 179 U. S., 58; *Ex parte* Yarbrough, 110 U. S., 651. This means a limitation of State powers,—as some might say; in strictness, it means a definition of federal powers; the jurisdiction of a State cannot exclude the jurisdiction of the United States.

[2] *Id.*, 8 : 17.

[3] No. lxii. (The authorship, strictly speaking, is uncertain, being assigned "to Hamilton *or* Madison.")

[4] Art. i., 10 : 1.

These limitations are of power usually classed as sovereign. Of similar scope are the limitations, prescribed by the Constitution, of State power of taxation,—that is, of laying imposts or duties; of keeping troops or ships of war; of entering into any agreement with another State, or with a foreign power; of engaging in war, unless actually invaded, or in imminent danger of invasion, not admitting of delay. None of these powers can a State in the Union exercise without the consent of Congress.[1]

143. When called into the actual service of the United States, the State militia are under the control of the President,—a limitation of the power of the State executives.[2] The Supreme Court of the United States has original jurisdiction in all cases in which a State is a party,[3] except in cases commenced or prosecuted against a State by citizens of another State, or by citizens or subjects of any foreign State, in which cases the judicial power of the United States has no jurisdiction whatever.[4] Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist in a State.[5] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

[1] Art. i., 10 : 2, 3. [2] *Id.* ii., 2 : 1. [3] *Id.* iii., 2 : 2.
[4] Amendment XI. [5] Amendment XIII.

States; or deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.[1] Denial of the right to vote by a State to electors qualified as electors by the Constitution of the United States shall work a proportional loss in the basis of representation in Congress from that State. No State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.[2] A little reflection will lead one to the conclusion that these limitations on the States, provided in the Constitution of the United States, are essential to the existence of the Union.

144. On the other hand, the States are recognized as checks and balances, as limitations on the United States, by the Constitution:

(1) Representatives are apportioned among the several States, but each State shall have at least one Representative,[3] and no State can be deprived of its equal suffrage in the Senate without its own consent.[4]

(2) The State executive alone has authority to issue writs of election to fill vacancies in the representation of a State.[5]

(3) Each State appoints presidential electors

[1] Amendment XIV. [2] *Id.*
[3] Art. i., 2 : 3. [4] *Id.* v.
[5] *Id.* i., 2 : 4. Amendment XVII., 2.

equal to the whole number of Senators and Representatives to which it is entitled in Congress.[1]

(4) In case of a disputed election of President or Vice-President, the Vice-President is chosen by the Senate,—the President, by the House of Representatives, the vote in the House being by States, each State having one vote, a quorum for this purpose consisting of a member or members, from two thirds of the States, and a majority of all the States being necessary to a choice.[2]

(5) The States, as represented in the Senate, have power to confirm or to reject (two thirds of the senators present concurring) treaties and nominations to office submitted to it by the President.[3]

(6) No State can be divided, nor can a new State be erected within a State without its own consent.[4]

(7) Each State is guaranteed a republican form of government by the United States, and protection against invasion, and (on application of its Legislature, or of its Executive) against domestic violence.[5]

(8) The Legislatures of two thirds of the States may call a convention for amending the Constitution; but no amendment becomes part of the Con-

[1] Art. iv., 1 : 2.
[2] Amendment XII.
[3] Art. ii., 2 : 2.
[4] *Id.* iv., 2 : 1.
[5] *Id.*, 4. But the Governor cannot so apply if the Legislature is in session. The reason here is that the people of the State have fully empowered their representatives in the Legislature "to see that the Commonwealth suffers no harm."

stitution until ratified by the Legislatures of three fourths of the States, or by Conventions in three fourths of them, as the one or the other mode may be proposed by Congress.[1] In this procedure of amending the Constitution, the several States are equal. A proposed amendment may be ratified and become part of the Constitution by the approval of three fourths of the States irrespective of their respective area, population, wealth, or any other mark or quality.[2] Finally, both as conferring benefits, and as prescribing the fundamental limitations on the States and on the United States, the Constitution and the laws and treaties made in pursuance thereof comprise "the supreme law of the land," and all officials "both of the United States and of the several States shall be bound by oath or affirmation to support it, anything in the constitution or laws of any State to the contrary notwithstanding."[3]

The character of this supremacy of the "law of the land" is indicated in the Constitution itself:

[1] Art. v.

[2] The Sixteenth Amendment (income tax) bears most heavily on States having large cities and a manufacturing population. It is possible that States which would be but slightly affected by a proposed amendment, might favor and ratify it; to avoid this possible discrimination, the suggestion has been made that in such a case the power of a State to ratify or to oppose ratification should be in proportion to its interests as affected by the proposed amendment. To this suggestion answer has been made that the Constitution is national, not local, in purpose and operation.

[3] Art. vi., 2, 3.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1] The fundamental character of the limitations which this provision establishes is seen as it affects the common interests of life. These interests include domestic relations, ordinary business transactions, recognized by common law; the ownership, acquisition, administration, and distribution of estates; peace and good order within the State; schools and education; the erection and care of public highways; personal liberty, freedom of worship, freedom of speech and of the press. These and cognate interests are within the scope and power of the State, and not, unless control over them is specially delegated, within the scope and power of the United States.

In truth, excepting in the election of United States Senators, members of the House of Representatives, and Presidential Electors, the citizen does not participate in federal government; and save through the post office, the customs, the income tax (which directly affects fewer than half a million persons in the United States), and in banking (including the use of the money of the country) the citizen rarely has anything to do with the United States. On the other hand, in the protection of his property,

[1] Tenth Amendment.

the education of his family, the right of use of highways, the validation of contracts, the rights, privileges and use of multitudinous relations safeguarded by the common law and the statute, it is the State, not the United States, which has first place, and, consequently, constitutional priority.

The exact line of division between State and federal powers is not known. The principle which rules in every attempt to fix this line is that the enumeration of rights and powers in a constitution,—State or federal,—"shall not be construed to deny or disparage others retained by the people"[1] of the State or of the United States.

145. The essential doctrine, here, is set forth by the Supreme Court in a decision which gives almost unlimited power to Congress in certain cases (its power over a Territory, or possession of the United States):

> There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect, or to secure dependencies against legislation manifestly hostile to their real interests. . . . The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are in this, as in many other instances,—as that for example, of declaring war,—the sole restraints on which they have relied to secure them from its abuse. They are the

[1] Ninth Amendment.

restraints on which the people must often solely rely in all representative government.[1]

The limitation of powers delegated by the people of the United States, in the federal Constitution, or of a State, in its constitution, implies a delegation of powers adequate to performance of legitimate civil functions. The large question involved in every case of a constitutional nature, or constitutional construction, is whether in the discharge of a function, or an office, the government, or any department of it is transcending its delegated powers. This question is of the essence of constitutional law and judicial interpretation.

146. The people interpret their will in their

[1] The first quotation is from Downes *v.* Bidwell, 182 U. S., 244 (1901); the second, from Gibbons *v.* Ogden, 9 Wheaton, 235 (1824), decision by Marshall. The application of the principle laid down by Chief Justice Marshall in 1824 and elaborated, at times, by the Supreme Court,—as in 1901,—was discussed by the eminent jurist, Thomas M. Cooley, in a brief address to the North Dakota Constitutional Convention, July 17, 1889. At that time he was Chairman of the Interstate Commerce Commission. "Don't, in your constitution-making, legislate too much. In your constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the Legislature, hereafter, from meeting all evils that may be within the reach of proper legislation. Leave something for them. *Take care to put proper restrictions upon them,* but at the same time leave what properly belongs to the field of legislation to the Legislature of the future. *You have got to trust somebody in the future and it is right and proper that each department of government should be trusted to perform its legitimate functions.*" Proceedings and Debates of the First Constitutional Convention of North Dakota, Assembled in the City of Bismarck, July 4 to August 17, 1889, p. 67. (Italization in text, not in original.)

election of executive, legislative, or judiciary, and the elective system prevails for all three in most of the States.[1] The courts interpret the laws in course of performance of their judicial duties, and their interpretation conforms to principles of justice. Thus in addition to the popular restraint, through frequent elections,—there is judicial restraint, or limitation of legislative and executive (but strictly ministerial) powers.[2] The entire case, as to the relation of the judiciary to the legislative, is covered by the rule laid down by the Supreme Court: "It is emphatically the province and duty of the judicial department to say what the law is."[3] This duty is of State judges as well as federal, for all American judges are alike bound by oath to support the Constitution.[4] Any American judge has jurisdiction to pronounce as to the constitutionality of an act of Congress or of a State legislature. The essential fact necessary in such pronouncement is that the validity of the law is vital to the real interests of a party to the case

[1] Thirty-three States have an elective judiciary. In Maine, New Hampshire, Massachusetts, Connecticut, Delaware, Mississippi, and New Jersey, the Governor nominates and the Senate confirms judges; in Rhode Island, Vermont, South Carolina, and Virginia, the Legislature elects the judges; in Florida, the Governor appoints judges of the Superior Courts and judges of the Supreme Court are elected by the people.

[2] Strictly executive functions are not within the jurisdiction of courts of law. See the discussion in Chapter VII.

[3] Marbury *v.* Madison, 1 Cranch, 137 (1803).

[4] Art. vi., 2, 3.

or controversy before the court. The decision of the court is not an *obiter dictum*, a mere philosophical opinion, so-called, of the judges, individually, or collectively, based on an interpretation of justice. The constitutionality of the law in question must be an essential part of the issue before the court.

Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another there is presented a question involving the validity of any act of any Legislature, State or federal, and the decision necessarily rests on the competency of the Legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act is constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that by means of a friendly suit, a party beaten in the Legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.[1]

The principle of constitutional interpretation is given by Chief Justice Marshall:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not

[1] Chicago, etc., Ry. Co. *v.* Wellman, 143 U. S., 339 (1892); Frees *v.* Ford, 6 New York, 176 (1852); Commonwealth *v.* McCloskey, 2 Rawle (Pa.) 374; Wellington, Petitioner, 16 Pickering (Mass.), 96.

prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[1]

And he develops the principle further:

> But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake (in courts of law) to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.[2]

147. The American constitutions are expressed and implied, limitations of governmental powers, though popularly considered as grants of such powers. "The truth is," wrote Hamilton in *The Federalist*, "the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights." It is "the Bill of Rights of the Union." It declares and specifies "the political privileges of the citizens in the structure and administration of the government." It "defines certain immunities and modes of proceeding which are relative to personal and private concerns." It comprehends "various precautions for the public security which are not to be found in any of the State constitutions."[3] James Wilson agreed with Hamilton that the Constitution is itself a Bill of Rights, remarking, in reply to the objection that the Constitution as it left the hands of its

[1] McCulloch *v.* Maryland, 4 Wheaton, 421 (1819).
[2] *Idem*, 423. [3] No. lxxxiv.

framers and went to the country had no Bill of Rights:

> A Bill of Rights would have been improperly annexed to the federal plan (*i. e.*, the Constitution, 1787), and for this plain reason that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution.[1]

As constitutions are the most solemn form of limitations of governmental powers, their interpretation determines the whole character of the government. The principle of constitutional interpretation is that

> words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its founders.[2]

The effect of the judicial pronouncement of the unconstitutionality of a law is to make it "in legal contemplation, as inoperative as if it had never been passed."[3]

[1] *Pennsylvania and the Federal Constitution*, McMaster and Stone, 254. Both Hamilton and Wilson were overruled by the public demand for a Bill of Rights, and the first ten Amendments were speedily added to the Constitution.

[2] Ogden *v.* Saunders, 12 Wheaton, 332 (1827); Martin *v.* Hunter's Lessee, 1 Wheaton, 304 (1816); United States *v.* Aaron Burr, Cotton's *Constitutional Opinions of John Marshall*, 1.100; Sturgis *v.* Crowningshield, 4 Wheaton, 122 (1819); Cohens *v.* Virginia, 6 Wheaton, 264 (1821); Cooley, *Constitutional Limitations*, 6th Edition, 204.

[3] Norton *v.* Shelby County, 118 U. S., 425.

148. To whatsoever extent State or federal officials perform ministerial functions they are answerable to the judiciary for their acts. Ministerial officers comprise the vast body of appointees in the States and in the United States. They are not executive officers, for such perform functions distinctively outside judicial investigation, but as distinctively within the political powers of the legislature. The judiciary is a powerful limitation of ministerial powers, in the sense that the performance of those powers is examinable in courts of law.[1]

In the popular mind the veto power may seem to be the principal executive check on legislation. This conviction takes form in State constitutions[2] which authorize the Governor to veto any item in an appropriation bill, or to cut the item down.

One result of this popular conviction is acquiescence in exercise of executive power which, in former times would have been interpreted by the people as "executive usurpation." At present the people rely upon their executives,—Governors, Presidents,—

[1] The relation of the judiciary to ministerial officers has already been examined; see Chapters VII and VIII. But see in this connection, the Secretary *v.* McGarrahan, 9 Wallace, 298; United States *v.* Black, 128 U. S., 40; United States *v.* Windom, 137 U. S., 636; United States *v.* Blaine, 139 U. S., 306; State *ex rel. v.* Stone, 120 Missouri, 428.

[2] Pennsylvania, 1873, Art. iv. §16. This provision does not empower the Governor to cut down an item, but in practice, it is so construed.

to act as a check,—a limitation,—on unwise legislation. This reliance, or expectation, is a powerful element in practical politics. Thus the limitations of government in America are threefold: first, the American constitutions themselves; secondly, frequent popular elections, and thirdly, the judiciary in its interpretation of constitutions and laws. These limitations are constitutional limitations. There is a fourth limitation but it belongs to another sphere,—the sphere of politics.[1]

[1] As sovereignty is a unit, any examination of particular aspects of it must be but a partial examination of its operations. The Constitution of the United States is a unit, in so far as the sovereignty,—the people of the United States,—have made it the expression of their plan of government. It follows that close examination of any department or feature of the Constitution as a plan of government discloses that feature in relation with other features; the Constitution is an expression of a mass of relations. Thus it is that a decision of the Supreme Court may relate to several matters, seemingly without relation, but necessarily co-related. The present chapter on *The Law of Limitations* discusses executive, legislative, and judiciary and the principles of government by which it acts. *The entire subject of American constitutional law must be viewed as a whole.* See Pollock *v.* Farmers' Loan and Trust Co., 158 U. S., 601 (1895); Field *v.* Clark, 143 U. S., 649 (1892). Also *The Federalist*, Nos. xliv.–lvi.

CHAPTER XI

THE LAW OF FUNDAMENTAL RIGHTS

149. The people of the several States, and the people of the United States, have delegated powers to the governments which they have respectively created. The powers thus delegated are general, or special. Doubtless the special are implied in the general, but in order to secure precision, and thus to mark off, in practical fashion, the boundaries of the grants, the delegation of a power, or the reservation of a power is declared as clearly as possible in language of adjudicated meaning, or capable of interpretation according to such meaning.

In the American constitutions, both federal and State, many provisions are administrative, that is, prescriptive of method, or procedure, as the strictly parliamentary provisions on the legislative respecting sessions, the journal, the quorum, adjournments, the method of passing bills, and the like. In the article on the judiciary, in State constitutions, provisions are found concerning appeals, writs,

minor court officials, sessions of courts, records, decisions, and the like, all of which are of secondary importance as compared with the general grant of judicial power.

In the executive article,—and notably in State constitutions, all that does not strictly belong to the executive office,—that is, to the distinctive functions of the Governor, is administrative. In the Constitution of the United States there is little of this administrative matter formally expressed, but much by implication,—for the appointees of the President (excepting the federal judges) are administrative officers, and the appointees of the President, of the heads of departments, or of the courts of law,—constituting what is known in law as "inferior officers"[1] comprehends quite all persons in the employ of the federal government.

In the State constitutions the important administrative offices are usually named, as of treasurer, auditor general, secretary of state, superintendent of education, commissioner of labor, of insurance, of agriculture, of railways, and the like. The duties of persons elected to these offices are usually prescribed in general terms. Their delegated powers are ascertainable by judicial procedure. A little reflection will make clear that most of the mere business of government, State or federal, is carried on by ad-

[1] Art. ii., 2 : 2.

ministrative officials who number, in the aggregate, in the United States quite a million. These persons possess slight, if any discretionary authority; they are ministerial public servants, and in the exercise of authority vested in them they are all amenable to judicial process.

150. That Congress, with delegated powers of legislation, and exercising them as the representative and agent of the sovereign people of the United States, has power to lay and collect taxes, to coin money, to declare war, to regulate commerce, and to do other acts, whether or not these powers were specifically conferred, can hardly be denied. The exercise of such powers goes with the very existence of government. An example is afforded by the decision of the Supreme Court that the power of the United States to acquire territory and to govern it is an exercise of the war power.[1] The Court here reasons from the general to the particular: from the general grant of power to declare war to the particular use of the power in governing an area of territory acquired.

It might seem, then, that as the whole always includes the part, and the general the particular,—the necessary and essential thing to do in creating government is merely to create it; for example, that the people of the United States should ordain and

[1] American Insurance Company *v.* Canter, 1 Peters, 511.

establish a Constitution consisting of the Preamble, which states the purpose and authority of the Constitution, and three general articles:

Article I. The legislative power is vested in Congress.

Article II. The executive power is vested in the President.

Article III. The judicial power is vested in a Court.

151. The Preamble and these three delegations of power comprise the essentials of the Constitution, lacking one other:

Article IV. The powers not delegated are reserved to the States or to the people, and the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people.[1]

The rights thus retained, that is, *not delegated*, are *fundamental rights*, are inviolate, and to guard against transgressions of the high powers delegated to government by the people are excepted out of the general powers of government; and being excepted out of the general powers, they are logically excepted out of the particular.

Thus, in final analysis, constitutional law in America is shaped and determined by interpretation of these fundamental rights. The supreme law cannot

[1] Amendments IX., X.

violate them. They comprise the Bills of Rights, or Declarations of Rights of the State constitutions and the first ten amendments of the federal Constitution.

152. There is no fixed order of these rights or priority among them. The Constitution, as framed originally, forbade any religious test for any federal office or trust.[1] The First Amendment forbids Congress to make any law respecting an establishment of religion, or prohibiting the free exercise thereof. The limitation is wholly on Congress. If any such exists for a State it is found in the constitution of that State. Crime cannot be protected under the claim or guise of being religion. Thus polygamy, bigamy, or conduct, ceremonies or observance criminal and offensive to the commonsense of mankind cannot be tolerated.[2] Freedom of religion cannot be made a cloak for immorality or crime.[3] The preservation of religious liberty is largely a function of the States. The essentials here are: the equality of religious establishments before the law; "exemption of all persons from compulsory support of religious worship and from

[1] Art. vi., 3. The ratifying conventions, 1788–9, formulated in the aggregate some two hundred amendments in the nature of provisions in a Bill of Rights. These, reduced to twelve, were presented by Madison (May 25, 1789) in the House of Representatives and were duly submitted to the States for ratification. Ten were ratified (1790).

[2] Reynolds *v.* United States, 98 U. S., 145 (1878).

[3] Davis *v.* Beason, 133 U. S., 333.

compulsory attendance upon the same"[1]; freedom of conscience and speech in religious matters, and entire exemption of the person from discrimination, domination, censorship, or interference in matters of religion by the State.

But this fundamental right does not free the person from responsibility to the State for the results of his belief or conduct, in so far as either imperils the State. Thus, so-called "religious belief" or conduct which destroys or endangers peace and good order, or the life, or lives, or reputation of a person or a community cannot work exemption under the claim of religious liberty.[2]

Freedom of speech, of the press, and of assembling are ancient rights, each won after long struggle against absolutism.[3] These rights are inviolable, but the same principle applies to them as to religious freedom: he who exercises them is responsible for the abuse of the right.[4]

[1] Cooley, *Principles of Constitutional Law*, 3d Edition, 226. As to "Readings from the Bible" in public schools, *see* Pfeiffer *v.* Board of Education, 77 N. W. Reporter, 250 (1898); State *ex rel.* Weiss *v.* District Board, 76 Wisconsin, 177 (1890).

[2] People *v.* Ruggles, 8 Johns (N. Y.), 290. The exemption from taxation of property belonging to religious bodies (corporations) is not because of any fundamental right of such bodies to exemption, but because of the will of the legislature. It is a matter of policy.

[3] The winning of these and other fundamental rights is largely the subject of English constitutional history.

[4] So expressed in many State constitutions, as Pennsylvania, 1873, i., 7.

153. Every citizen is subject to the legislative power of the State, and abuse of a fundamental right,—as of freedom of speech or of the press in uttering a libel,—cannot exempt the party from prosecution. No man can make plea of a fundamental right as making him "above the law." The law accords with the fundamental right.

The right to petition government for redress of grievances[1] is essentially the right of freedom of speech in a particular way. The right to keep and bear arms is essentially the right to self-protection, but this right may not be abused with impunity; it does not empower any person to take the law into his own hands, or to carry weapons.[2] Carrying concealed weapons is not an exercise of the right to bear arms, unless in the performance of a function, the execution of an office, in which case such carrying is permitted (licensed) by the State. Essentially the right to bear arms is akin to the right to revolution as set forth in the Declaration of Independence.

The person, his or her papers and dwelling are exempt from unwarrantable searches, seizure, or invasion. The exemption here goes to the fundamental supremacy of the civil over the military authority. A warrantable search is lawful because the sovereign—the State or the United States—

[1] A right fully established at the trial of the Seven Bishops, 1688.
[2] United States *v.* Cruikshank, 92 U. S., 542 (1875).

has the primary right of self-protection, safety, peace, good order,—indeed, the right to realize the essential purposes and ends of sovereignty. But the boundary between private right and public necessity (another expression for sovereignty) must be drawn with precision. The language of the Fourth Amendment is explicit.[1]

154. The first ten amendments prohibit the United States from violating the fundamental rights of persons; they are a protection against federal tyranny. The Thirteenth and Fourteenth Amendments prohibit the States from violating certain fundamental rights of persons. Any one comparing the Fifth and the Fourteenth Amendments discovers the same language as to "due process of law" and "life, liberty, and property." The State constitutions protect persons in like manner. Thus the fundamental right prevails in both jurisdictions,—that of the State and that of the United States.

The Fifth Amendment does not exempt a person from presentment or indictment, or trial, but recognizes his fundamental right to protection by due process of law.[2]

[1] West *v.* Cabell, 153 U. S., 78; Weeks *v.* U. S., 232 U. S., 383; *Ex parte* Milligan, 4 Wallace, 2; U. S. *v.* Louisville & Nashville R.R. Co., 236 U. S., 318; U. S. *v.* Boyd, 116 U. S., 616 (the leading case), and Cotting *v.* Kansas City Stock Yards Co., 183 U. S., 79 (1901).

[2] Paul *v.* Virginia, 8 Wallace, 168 (1808); Blake *v.* McClung, 172 U. S., 239 (1898); Lockner *v.* New York, 198 U. S., 45 (1905).

The protection of the person is of his life, liberty, and property—his rights to either of which are fundamental. Yet his life may be taken in defense of the State, or of the United States; he may be deprived of his liberty,—civil, political, or natural,—for cause, and his property may be confiscated to the State, or to the United States, for like reason. This apparent conflict between theory and fact is in no sense a violation of the fundamental right of the person thus affected. He is entitled to his fundamental rights; so are the several States and the United States entitled to their respective fundamental rights: but they are sovereignties; the person is not, and his fundamental rights to life, liberty, and property give place to the rights of the sovereign.

155. Neither the State government nor the federal government is that sovereign, but each is an agent of a sovereign. The sovereign can do no wrong. To the extent that the individual person is identified with sovereignty, he or she can do no wrong, and his or her rights are primary as well as fundamental. For this reason the first ten amendments specify the protection and the guarantees which apply to the person as against the powers of the Government of the United States.[1]

[1] The rights of the person, and his or her rights of property are the essential subject of the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. Similar provisions are included in the Bills of Rights in the State constitutions.

The test whether or not there is invasion of the fundamental rights which are excepted out of the powers of government is the issue, "Is sovereignty imperiled?" As against sovereignty, the person has in the final test no rights whatever: that is no rights that are recognized and protected by constitutional law. The supreme test is, however, rarely made.

156. The fundamental rights outlined in the first ten, and in the Thirteenth and Fourteenth Amendments to the Constitution are essentially the right of the person to the protection of sovereignty against acts of the government. The nature of this protection is expressed in the Ninth and Tenth Amendments. Sovereignty does not define its rights; it defines or enumerates powers which it delegates to government. Were sovereignty to define (if it were possible to define) its rights, it would limit itself, and to that extent cease being sovereign. The fundamental rights[1] thus reserved (in addition to those already mentioned but not in any sense exhaustive) are, the right of equality before the law; of consequent equal protection of the laws; of the exercise of the police power; of education; of employment; of making contracts; of trial by jury; of being a person (not a thing) and to realize and possess the privileges and immunities thereunto pertaining.

[1] Corfield *v.* Coryell, 4 Washington C. C., 371; Slaughter House Cases 16 Wallace, 36.

157. Practically, these fundamental rights are realized through the judiciary when the issue and test of their existence arise. Thus we turn to judicial decisions for the interpretation of these rights, or for declaration, in official form, of their primary rank as "reserved to the people or to the States." All legislation, State or federal, must conform to them. Whether it actually does so conform is determinable in and by courts of law, on the principle, declared by Chief Justice Marshall, that "it is emphatically the province and duty of the judicial department to say what the law is." Thus for the protection of these fundamental rights the judiciary, by every principle of American constitutional law, is final, unless the sovereign arouses himself and changes the function, or office of the judiciary itself.[1] The sovereign may thus act, as the people of a State, or of the United States.[2] The now familiar decision of the Supreme Court as to the power of Congress over American territory (as differing from a State in the Union)[3] recognizes and declares that there are certain principles of natural justice

[1] This act of sovereignty is so rare as almost to be unknown. In America the act takes the form of an amendment to the Constitution.

[2] The forty-eight States have had, in the aggregate, some one hundred and twenty-five constitutions, and to these have been added some three hundred amendments (1776–1917). The federal Constitution has been amended seventeen times (1787–1913).

[3] Downes *v.* Bidwell, 182 U. S., 244 (1901).

which secure dependencies against legislation manifestly hostile to their real interests. These "principles of natural justice" as applied to constitutional government and law undoubtedly mean fundamental rights which secure persons, anywhere under American jurisdiction, "against legislation manifestly hostile to their real interests"; for the essential interest of the person,—that is, the "citizen" as defined in the Constitution,—is the interest of the sovereign,—the people of the United States, or of a State.

158. It is evident that there is a close relation between the law of constitutional limitations and the law of fundamental rights in America. A limitation is not always a right, in law; a right is not always a limitation; but the law of constitutional government in America—and this means the constitutional law of America—is worked out by judicial interpretation of these limitations and these rights.

The right of freedom of worship and of exemption from compulsion to attend any place of worship is not violated by reading from the Bible in the public schools, or reading selections from the Bible. Such a reading does not convert the public school into a religious or theological seminary, nor is the reading a conversion of the public money to the use of a religious sect. "I am not able to see," observed the court, "why extracts from the Bible should be pro-

scribed, when the youth are taught no better authenticated truths from profane history."[1] If under the influence of a religious belief (polygamy) that it was right, a man deliberately married a second time having a first wife living, the want of consciousness of evil intent did not excuse him, but criminal intent would be implied.[2]

The compulsory production of a man's private papers to establish a criminal charge against him is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search or seizure would be; because it is a material ingredient, and effects the sole object of the search and seizure. Compulsory production of papers is unwarrantable search and seizure. Such unwarrantable seizure of books and papers is compelling a person to be a witness against himself. The offense consists in the "invasion of the indefeasible right of personal security." The manner of the invasion whether by force or by quiet entrance is not the violation; the violation of the right is the invasion of it, in whatever manner.[3]

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as

[1] Pfeiffer *v.* Board of Education of the City of Detroit, 77 N. W. Rep., 250 (1898).

[2] Reynolds *v.* United States, 89 U. S., 145 (1878).

[3] Boyd *v.* United States, 116 U. S., 616 (1886). (Important historical data given in this case.)

the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as they had been formally expressed. Thus the freedom of speech and of the press (Art. i.) does not permit the publication of libels, blasphemous, or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (Art. x., 11) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy, (Art. v.) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (United States *v.* Ball, 163 U. S., 662, 672); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, or by statutory enactment (Brown *v.* Walker, 161 U. S., 591 and cases cited); nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.[1]

159. "The words 'due process of law' were undoubtedly intended to convey the same meaning

[1] Robertson *v.* Baldwin, 165 U. S., 275 (1897).

as the words, 'by the law of the land' in Magna Charta." This means, in American constitutional law, to use Webster's words in the Dartmouth College case,—"the general law—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Cooley states it as meaning "that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."[1]

This means that whatever is the actual law of the land, the regular and established practice of courts and the legal landmarks of society defines the meaning of the phrase "due process of law." A man who by the laws of his State has had a fair trial in a court of justice, according to the modes of proceeding applicable to such a case has been tried by due process of law.[2]

It is within the police power of a State to regulate the hours during which a business, say washing and ironing, may be carried on, and the kind of building, whether or not fireproof, which may be used for such business, but discrimination against citizens or aliens effecting the elimination of certain citizens or aliens from carrying on the business, while others are

[1] Cooley, *Constitutional Limitations*, 353; *Ex parte* Wall, 107 U. S., 265 (1883). Murray's Lessee *v.* The Hoboken Land and Improvement Company, 18 Howard, 272 (1855), considered the leading case.

[2] Hurtado *v.* California, 110 U. S., 516 (1884).

permitted to carry it on under similar conditions is a violation of the Fourteenth Amendment which secures to every person the equal protection of the laws. The discrimination is none the less unconstitutional because the person discriminated against is an alien, when the treaty between the United States and the sovereignty to which the alien owes allegiance secures to the alien in the United States "the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation." For a treaty is part of the supreme law of the land.[1]

The principle here also includes another well-settled rule of American constitutional law, that while a State may exercise its police power within its own jurisdiction, imposing restrictions on foreign corporations doing business within its territory, it cannot so exercise its police power as to infringe upon interstate or foreign commerce. Thus a police regulation of a State which prevents or obstructs, directly or indirectly, a corporation within its territory, as a party that is engaged or would be engaged in commerce, conflicts with the power of Congress to regulate commerce and therefore is unconstitutional. But police regulation of the corporation as to other matters is not a violation of the Fourteenth Amend-

[1] Yick Wo *v.* Hopkins (San Francisco Laundry Cases), 118 U. S., 356 (1886).

ment.[1] The principle here is "to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."[2]

160. The Fourteenth Amendment takes no police powers from the States that were reserved to them when the Constitution was adopted. The States may still do lawfully as they will with their own, and this means that they will exercise authority over their own jurisdiction. That Amendment "in declaring that no State" shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and

[1] Pembina Mining Company *v.* Pennsylvania, 125 U. S., 181 (1888). Barbier *v.* Connolly, 113 U. S., 27 (1885). Holden *v.* Hardy, 169 U. S., 366 (1898). But an act making it a criminal offense to employ a female in any clothing factory more than forty-eight hours in any one week violates the Fourteenth Amendment as violating the right of contract and being class legislation: Ritchie *v.* State, 155 Illinois, 98 (1895).

[2] Dent *v.* West Virginia, 129 U. S., 114 (1889). And cases cited.

property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary

restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated is not within the Amendment.[1]

161. The right of trial by jury, reserved as a fundamental right, is a common law right of great antiquity. As the word "jury" is used in the Constitu-

[1] Barbier *v.* Connolly, *supra.* Mugler *v.* Kansas, 123 U. S., 623 (1887). The power to regulate, that is, the jurisdiction of the police power of the State, as decided in Munn *v.* Illinois, 94 U. S., 113 (1876), includes the power "to provide a maximum charge for the storage and handling of grain" in a warehouse privately owned. This is settled law, but careful reading should be made of the dissenting opinions in this case: Budd *v.* New York, 143 U. S., 517 (1892), sustaining Munn *v.* Illinois, with strong dissenting opinions; Spring Valley Water Works *v.* Schottler, 110 U. S., 347 (1884) sustaining Munn *v.* Illinois, with strong dissenting opinions. The economic question here is whether the State can fix prices, wages, compensation, hours of labor, etc. In this connection examine Lockner *v.* New York, 198 U. S., 45 (1905), sustaining a law of New York State making it a penal offense for any employer to require and permit any employee to work for him more than sixty hours in any one week. The law was sustained as a constitutional exercise by the State of its police power; but see dissenting opinions. The *per contra* was "the right of the individual to liberty of person and freedom of contract."

tion, and as jury trial is secured by the Seventh Amendment, its meaning must be discovered from English history and common-law practice. That history and that practice alike prove that only a court of law can have a jury, and that a body of men free from judicial control is not and never was a common-law jury; that is, according to the Seventh Amendment, a constitutional jury is a jury in a court of record, and a number of men, a so-called jury in a court of a justice of the peace, is not a jury in the sense in which that word is used in the Constitution. A court, when we consider its derivation and history, comprises the judge assisting the jury and the jury assisting the judge. The right of trial by jury means for many purposes the same as the right to due process of law.[1]

162. The fundamentals of government are a unit, like government itself, and he who rests his case on one fundamental right really rests his case on all. The principle which permeates and includes all these fundamentals—usually set forth in Bills of Rights—is thus expressed by the Supreme Court:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they

[1] Capital Traction Company *v.* Hof, 174 U. S., 1 (1899). Many cases cited and the history of trial by jury given.

do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[1]

[1] Mr. Justice Matthews in Yick Wo *v.* Hopkins, 118 U. S., 356 (1886).

CHAPTER XII

THE LAW OF CITIZENSHIP

163. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."[1] The phrase "subject to the jurisdiction thereof" excludes "children of ministers, consuls, and citizens or subjects of foreign states born within the United States.[2] The supreme law clearly recognizes and establishes a distinction between United States citizenship and State citizenship. To be a citizen of a State, a person must reside within that State, but to be a citizen of the United States, it is necessary only that he or she be born or naturalized within the jurisdiction of the United States. Thus American citizenship, like the operation of American constitutional law in all its aspects, is a matter of jurisdiction, or sovereignty.

In America there are two citizenships, distinct

[1] Amendment XIV., July 28, 1868. It will be noticed here that the word "territory" is not used.

[2] Slaughter House Cases, 16 Wallace, 36 (1872).

from each other, and depending upon different characteristics and circumstances, and the essential difference is caused by a difference of jurisdiction. In strict conformity to this distinction, the Constitution prohibits a State from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States."[1] The limitation is not as to laws affecting the privileges and immunities of citizens of the several States; equality of citizens of States is secured by another provision.[2]

The privileges and immunities of the citizen of one State removing to another State are the same, no more, no less, than the privileges and immunities of the citizens of the State into which he or she removed.[3] The privileges and immunities of citizens of the several States rest for security and protection with the States themselves,—where they rested before the Constitution was made. These privileges and immunities are not placed under the care of the United States except so far as the Constitution declares that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." These privileges and immunities of citizens of the several States are *fundamental*,[4] and are commonly set forth in Bills of

[1] Amendment XIV. [2] Art. iv., 2 : 1. [3] See p. 150.
[4] Canfield *v.* Coryell, 4 Washington, C. C., 371, 380; Paul *v.* Virginia, 8 Wallace, 180, and see pp. 191–211 of the present volume.

Rights found in the State constitutions. The sole purpose of the Fourteenth Amendment is to declare to the several States that

whatever those rights,—as you grant or establish them to your own citizens, or as you limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.[1]

164. What then are the privileges and immunities of citizens of the United States? They are the privileges and immunities secured to them by the Constitution. Among them are

to come to the seat of government to assert any claim he may have upon that government; to transact any business he may have with it; to share its offices; to engage in administering its functions; the right of free access to its seaports, through which all operations of foreign commerce are conducted; to the subtreasuries, land offices, and courts of justice in the several States[2]; "to demand the care and protection of the federal government over his life, liberty, and property when on the high seas, or within the jurisdiction of a foreign government; to peaceably assemble and petition for redress of grievances; the privilege of *habeas corpus;* to use the navigable waters of the United States however they may penetrate the territory of the several States; all rights secured to (American) citizens by treaties with foreign nations"; the right, on his own volition to become a citizen of any

[1] Slaughter House Cases, *supra.*

[2] Crandall *v.* Nevada, 6 Wallace, 36 (1867).

State of the United States by a *bona fide* residence therein, with the same rights as other citizens of that State.[1]

Thus it appears that the rights of a citizen—his "privileges and immunities"—are measurable by the jurisdiction of the sovereignty to which he owes allegiance. Between allegiance and protection as between citizenship and sovereignty there is a reciprocal relation.

165. The Fourteenth Amendment did not add to the privileges and immunities of a citizen.[2] It simply furnished an additional guaranty to the protection of such as he already had. It did not add the right of suffrage to these privileges and immunities as they existed at the time of the adoption of the Constitution. The United States guarantees to every State in the Union a republican form of government,[3] but this is not a guarantee to any citizen of the right to vote, nor does the Constitution confer that right on any person.[4] That right (or privilege, as it is in strict contemplation of law) was not the same among the original States, the qualifications for voting differing widely among them, and

[1] Slaughter House Cases, *supra*. (Some additional rights are secured citizens of the United States by Amendment XIV., § 2; and by Amendments XIII. and XV.)

[2] Minor *v.* Happersett, 21 Wallace, 162 (1874).

[3] Art. iv., 4.

[4] Minor *v.* Happersett, *supra*. (But see *Ex parte* Yarbrough, 110 U. S., 651.)

also in the same State at different times.[1] When the Constitution confers citizenship it does not confer the right to vote.

There is, however, a right to vote possessed by certain citizens of the United States, namely they who vote for members of Congress and Senators of the United States, and (by implication) electors of President and Vice-President. The Constitution defines electors of Congressmen and Senators as the same persons who are entitled in the several States to vote for the most numerous branch of the State Legislature.[2] The United States thus

adopts the qualification thus furnished as the qualification of its own electors of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right depend exclusively on the law of the State.[3]

The United States has sovereign power to prescribe electoral qualifications for its own citizens; it has chosen to adopt State qualifications. The non-

[1] These qualifications, in the aggregate, have been of age, sex, residence, religion, property, race, and tax-paying. See the provisions in the State constitutions in *Charters and Constitutions*, 7 vols., U. S. Government Printing Office, 1909; and a detailed account of these early qualifications (1776–1850) in the author's *Constitutional History of the American People*, i., ch. iii.

[2] Art. i., 2 : 1; Amendment XVII.

[3] *Ex parte* Yarbrough, 110 U. S., 651, 653; Wiley *v.* Sinkler, 179 U. S., 58 (1900).

exercise of the power does not work denial of its existence. The principle involved is one of sovereignty, that non-user of a sovereign right cannot invalidate the right.

166. While the Fourteenth Amendment added nothing to the rights and privileges of citizens, for "the equality of the rights of citizens is a principle of republicanism,"[1] it guaranteed those rights; but "the power of the national government is limited to the enforcement of the guaranty."[2] The Amendment does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action "which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to them the equal protection of the laws."[3] Congress is empowered by the Amendment "to adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous."[4]

The essential matter here involved is sovereignty.

> The true doctrine is, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Con-

[1] United States *v.* Cruikshank, 92 U. S., 542 (1875). [2] *Idem.*
[3] Civil Rights Cases, 109 U. S., 3 (1883). [4] *Idem.*

stitution and constitutional laws of the latter are the supreme law of the land; and when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.[1]

Thus, in application of this principle, the law of a State discriminating against persons of color by eliminating them to serve as jurors is unconstitutional.[2] So too is an act of Congress unconstitutional, that operates as, or creates, a municipal law for the regulation of private rights, and that places Congress in the stead, or office of the State legislatures, so that the federal Legislature, instead of enacting laws corrective of prohibited State laws, or counteracting such laws, assumes the office of the State legislatures in their general legislation. Such Congressional legislation "steps into the domain of local jurisprudence."[3]

167. Such unconstitutional legislation by Congress was the Civil Rights Bill of 1866, which declared

[1] *Ex parte*, Siebold, 100 U. S., 371 (1879).
[2] Strauder *v.* West Virginia, 100 U. S., 303 (1879).
[3] Civil Rights Cases, 109 U. S., 3 (1883).

that all persons within the jurisdiction of the United States should be entitled

to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable to citizens of every race and color, regardless of any previous condition of servitude.[1]

Here again the essential matter is one of jurisdiction, or sovereignty. The several States have jurisdiction over the matters comprised within the so-called Civil Rights Bill. Inn-keepers, public carriers, owners or managers of theaters and public halls are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them. No race or class is a special favorite of the laws, and the enjoyment of accommodations in inns, public conveyances, and places of amusement, is not a "privilege or immunity" of a citizen, in the sense that he or she possesses a civil or legal right to such enjoyment. The act, or decision, of a mere individual,—the owner of an inn, or of a public conveyance, or place of amusement, refusing such accommodation, is not the imposition of a badge of slavery or involun-

[1] 14 Statutes at Large, 27, Ch. 31; Enforcement Act, May 31, 1870, 16 Statutes at Large, 140, Ch. 114.

tary servitude upon the applicant; neither does such act or decision inflict a civil injury, unless the law of the State makes such act or decision an injury.[1]

The principle here involved is illustrated by a law of California, held to be constitutional by the Supreme Court of the United States, that "due process of law" is not denied to a person who, in that State, by its law, was "prosecuted by information," and (as was claimed) was "tried and illegally found guilty of (murder) without any presentment or indictment of any grand or other jury."[2]

The Court sustained the State law as securing due process of law in principle,—that "prosecution by information" instead of "indictment of a jury" is not a violation of the principle but merely a variation of the form of due process of law.[3] In other words, the California law in no way disparaged or abridged the privileges or immunities of the citizen.[4]

[1] Civil Rights Cases, *supra*.

[2] That is, violating Amendments VI. and XIV.

[3] Hurtado *v.* California, 110 U. S., 516 (1884).

[4] "The trial by jury in civil cases guaranteed by the Seventh Amendment (Walker *v.* Sauvinet, 92 U. S., 90) and the right to bear arms guaranteed by the Second Amendment (Presser *v.* Illinois, 116 U. S., 252) have been distinctly held not to be privileges and immunities of citizens of the United States against abridgment by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury in the Fifth Amendment (Hurtado *v.* California, 110 U. S., 516) and with respect to the right to be confronted with witnesses, contained in the Sixth Amendment (West *v.* Louisiana, 194 U. S., 258). In Maxwell *v.* Dow, 176 U. S., 606, when the plaintiff in error had been convicted

168. The principle regulating the definition of United States citizenship is that principle of the common law which recognizes "the ancient rule of citizenship by birth within the dominion."[1]

Naturalization is an artificial birth made possible by the will of sovereignty. It is effected by the operation of law,—and in America, by operation of statutory law only. Congress has not the exclusive power to pass naturalization laws, but it has the exclusive power "to establish a *uniform* rule of naturalization."[2] The power exercised here is suggested in the word "uniform."[3] Congress has seen fit to vest the exercise of this power in certain courts of law. Strictly speaking, the exercise of the function, in any of its aspects, is not essentially judicial. Courts of law have no functions, can exercise no functions, and no functions can be imposed upon

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in a State court of a felony upon an information, and by a jury of eight persons, it was held that the indictment made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States, as those words were used in the Fourteenth Amendment. . . . We conclude, therefore, that the exemption from compulsory self-incrimination ('see Amendment V.') is not a privilege or immunity of national citizenship guaranteed by this clause ('the first clause') of the Fourteenth Amendment against abridgment by the States." Twining *v.* State of New Jersey, 211 U. S., 78 (1908).

[1] United States *v.* Wong Kim Ark, 169 U. S., 649 (1898).

[2] Art. i., 8 : 4.

[3] United States *v.* Villato, 2 Dallas, 373; Nishimura Ekin *v.* U. S., 142 U. S., 651; Luria *v.* U. S., 231 U. S., 9.

them except those of a judicial nature.[1] If the courts are willing to exercise a ministerial function and are empowered to exercise it by Congress, as in the naturalization of aliens, that exercise cannot be questioned as being unconstitutional.

169. The test here is jurisdiction. A person may by voluntary expatriation become allegiant to another jurisdiction or sovereignty, but he cannot escape allegiance to some one jurisdiction. He must be citizen or subject of a sovereignty. As all property capable of ownership must have an owner, so must every person be citizen or subject of some sovereignty. A vessel, wherever it may be, is part of the territory of the country to which it belongs.[2] By parity of reasoning a person is deemed allegiant to some jurisdiction or sovereignty. A vessel owning no jurisdiction is a pirate.

170. The Fifteenth Amendment declares that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. This Amendment

does not take away from the State governments in a general sense the power over suffrage which has belonged

[1] *Ex parte* Griffiths, 118 Indiana, 83 (1889), citing many cases, (*inter alia*) Hayburn's Case, 2 Dallas, 409, n.; United States *v.* Ferrera, 13 Howard, 40, n.; United States *ex rel. v.* Duell, 172 U. S., 576 (1898), also to be consulted.

[2] United States *v.* Rodgers, 150 U. S., 249 (1893).

to those governments from the beginning, and without the provision of which power the whole fabric upon which the division of State and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and of the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the States since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.[1] The Amendment does not change, modify, or deprive the States of their full power as to suffrage, except of course as to the subject with which the Amendment deals, and to the extent that obedience to its command is necessary. Thus the authority over the suffrage which the States possess, and the limitations which the Amendment imposes, are co-ordinate, and one may not destroy the other without bringing about the destruction of both.[2]

But while the Amendment "gives no right of suffrage"

. . . the result might arise that as a consequence of the striking down of a discriminating clause, a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out.[3]

[1] Guinn and Beal *v.* United States, 238 U. S., 347 (1915). [2] *Idem.*

[3] *Idem* and citing *Ex parte* Yarbrough 110 U. S., 651 (already considered in the present Chapter) and Neal *v.* Delaware, 103 U. S., 370. The decisions of the Supreme Court do not conflict with a State constitution that requires, as a qualification for voting, a literacy test, or a religious test, or a property test, or indeed any test which is not a discrimination on account of race color or previous condition of servitude.

171. Both the States and the United States are forbidden by the Constitution to enact *ex post facto* laws. The prohibition affects every citizen as securing him from the peril of legislation of the kind forbidden. It is a sweeping limitation of power for his or her benefit, and operates for all citizens of whatever age, condition, or circumstance. An *ex post facto* law is one that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes that action; that aggravates a crime, or makes it greater than it was when committed; that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; that alters the legal rules of evidence, and receives less or different testimony than the law required, at the time of the commission of the offense, in order to convict the offender. But no law is *ex post facto* within the constitutional prohibition that "mollifies the rigor of the criminal law." Only those laws are *ex post facto* which "create, or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction."[1]

[1] Calder *v.* Bull, 3 Dallas, 386 (1798); Kring *v.* Missouri, 107 U. S., 221 (1882); Thompson *v.* Utah, 170 U. S., 343 (1898). All the State constitutions forbid *ex post facto* laws.

The right secured to the citizen by the constitutional inhibition of *ex post facto* legislation forms part of his, or her, privileges and immunities; for though the inhibition cannot be said to be derived

172. But he who, under State law, voluntarily waived his right of trial by jury and elected to be tried by the court and by it was adjudged guilty and was condemned to be hanged, was not deprived of any right, privilege, or immunity for his protection by the Fourteenth Amendment, but was tried and condemned in strict accordance with the forms prescribed by the constitution and laws of the State, and with special regard to the rights of accused persons under its jurisdiction.[1] A person may waive a fundamental right[2] but neither the State nor the United States can lawfully invade the indefeasible right of a person to personal security[3]; such invasion constitutes an "unwarrantable search and seizure." The service of a lawful warrant operates practically as a waiver of right by the person searched or seized; but were a person to waive his right, say of trial by jury, such waiver would not confer power on any court or jury to try him. "Consent can never confer jurisdiction."[4]

173. An act of Congress that no person shall be excused from attending and testifying, or from

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from the common law,—and may be said to be essentially statutory, it has become recognized as a fundamental right and of rank with any other fundamental right.

[1] Hollinger *v.* Davis, 146 U. S., 314 (1892). [2] *Idem.*

[3] Boyd *v.* United States, 116 U. S., 616 (1886). The right covers "persons, houses, papers, and effects." Art. iv.

[4] Harris *v.* People, 128 Illinois, 585 (1889).

producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to its subpœna, on the ground that he might thus be compelled to be a witness against himself and so become subject to penalty is constitutional because its additional provision immuning him from future prosecution by reason of his evidence thus given sufficiently satisfies the constitutional guarantee of protection.[1]

So too the stenographic report of testimony given in court, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of a deceased witness is competent evidence, is admissible, and does not conflict with the provision of the Constitution that an accused person shall have the right "to be confronted with the witnesses against him."[2] The principle here is essentially one of sovereignty,—the court declaring: "the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[3] The sovereign right of a State, or of the United States with respect to citizenship, is sufficient, in either, to effect the purposes for which either exists; but in the American dual system of

[1] Art. v., Act of February 11, 1893, Statutes at Large, 443; Brown *v.* Walker, 161 U. S., 591 (1896).

[2] Amendment VI. Mattox *v.* United States, 156 U. S., 237 (1895).

[3] *Idem.*

government, citizenship has fundamental rights, which are guaranteed, and political privileges, which are conferred and protected.

174. Civil rights and their guarantees, both in the States and in the United States, are formulated as limitations on government,—as fundamentals reserved "and above any constitutional sanction." These rights include those of religious liberty, personal security, security of dwellings, papers, and property, personal freedom, due process of law, jury trial, and equal protection of the laws. The line of demarcation between these fundamental rights is not easily drawn, nor even drawn with precision. These rights, being fundamental rights, exist independent of the government which the people of a State, or the people of the United States ordain and establish. That sovereignty—the people themselves—has power to alter, to modify, or even to destroy these rights, or any of them, must be admitted, but that sovereignty ever, under a republican form of government, will alter, modify, or destroy these rights, may with equal assurance be denied.

175. The political privileges of citizenship rest on a different conception of government. Political privileges—of which the most important are the right to vote and the right to be voted for, and to execute an office because of election to office—are not fundamental, that is, they are not civil rights.

The State, or the United States, has the right to prescribe qualifications for an elector, or for candidacy for any office. Usually these qualifications are of age, residence, sex, and tax-paying,—the people of the United States having also declared that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude. This inhibition does not make the fact of race, or color, or previous condition of servitude a fundamental civil right guaranteed by the United States under the Constitution. In no sense does the Fourteenth Amendment confuse civil and political rights. No person can vote unless he or she has complied with the requirements (qualifications) for voting, prescribed by the State in which he or she resides. No person acquires civil rights by a similar compliance. By birth or naturalization (and naturalization is a sort of legal birth by the will of the sovereign), a person possesses civil rights, but no person possesses the privilege of voting either by birth or by naturalization. The privilege of voting may be lost by removing from a polling district; by neglect to register; by neglect to pay a tax,—in brief, by failure to comply with any electoral law of the State; but no person forfeits his or her civil rights by mere neglect. Infants, minors, adults, men, women, and children possess equal civil rights. Impairment,

suspension, forfeiture of civil rights is effected only by commission of crime, that is, by a voluntary act, inimical to sovereignty itself. Such an act also cuts off the privilege of voting, or of being voted for with effect of induction into office, because the person who imperils sovereignty by commission of a crime would, in all probability, imperil sovereignty by voting. The exercise of the suffrage has long continued in America, and, both in laws and in constitutions, is commonly referred to as a "right." The tendency of privileges is to become rights. In America, however, the republican form of government exists both in the States and in the United States. Practically, civil rights and political privileges are determined by the will of the people.

Appendix

THE

CONSTITUTION

OF THE

UNITED STATES OF AMERICA

(Compared with the Original in the Department of State)

WE THE PEOPLE[1] of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Section 1.

1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

1. The House of Representatives shall be composed of Members chosen every second Year by the People of the

[1] In the original the clauses are not numbered, nor is there any title to the document. It begins, "We the People."

several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

2. No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

3. [1]Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

[1] See Amendments XIII., XIV., XV., XVI.

Section 3.

1. [1]The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year; so that one third may be chosen every second Year; and if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

3. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

5. The Senate shall chuse their other Officers, and also a President pro tempore in the Absence of the Vice-President, or when he shall exercise the Office of President of the United States.

6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of

[1] See Amendment XVII.

the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall, nevertheless, be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

2. The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

3. Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

Section 7.

1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment), shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

1. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts

and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. To borrow Money on the credit of the United States;

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

4. To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

5. To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

6. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

7. To establish Post-Offices and Post Roads;

8. To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

9. To constitute Tribunals inferior to the Supreme Court;

10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

13. To provide and maintain a Navy;

14. To make Rules for the Government and Regulation of the land and naval Forces;

15. To provide for calling forth the Militia to execute

the Laws of the Union, suppress Insurrections and repel Invasions;

16. To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.

1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

3. No Bill of Attainder, or ex post facto Law shall be passed.

4. No Capitation or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

5. No Tax or Duty shall be laid on Articles exported from any State.

6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties, in another.

7. No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10.

1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any title of Nobility.

2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's

inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops or Ships of War, in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or Engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

Section 1.

1. The Executive Power shall be vested in a President of the United States of America. He shall hold his office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

3. [1]The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which

[1] See Amendment XII.

List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such a Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse, by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List, the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

4. The Congress may determine the Time of chusing the Electors, and the day on which they shall give their Votes; which Day shall be the same throughout the United States.

5. No Person except a natural-born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice-President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability both of the President and Vice-President declaring what Officer shall then act as President, and such Officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be Increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period, any other Emolument from the United States, or any of them.

8. Before he enter on the Execution of his Office he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

Section 2.

1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two

thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers, and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of the next Session.

Section 3.

1. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall commission all the Officers of the United States.

Section 4.

1. The President, Vice-President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors

ARTICLE III.

Section 1.

1. The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

1. [1]The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

[1] See Amendment XI.

3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

ARTICLE IV.

Section 1.

1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2.

1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

2. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and

be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

3. [1]No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

1. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[1] See Amendments XIII., XIV., XV.

ARTICLE V.

1. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United

States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

1. The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Done in Convention by the Unanimous Consent of the [1]States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth *In Witness* whereof We have hereunto subscribed our Names,

G°: WASHINGTON—*Presidt. and deputy from Virginia.*

Attest William Jackson Secretary.

[1] The word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty-second and thirty-third Lines of the first Page and the Word "the" being interlined between the forty-third and forty-fourth Lines of the second Page.

[Note by Department of State: The interlined and rewritten words mentioned in the above explanation, are in this edition, printed in their proper places in the text.]

New Hampshire:
John Langdon
Nicholas Gilman

Massachusetts:
Nathaniel Gorham
Rufus King

Connecticut:
Wm: Saml. Johnson
Roger Sherman

New York:
Alexander Hamilton

New Jersey:
Wil: Livingston
David Brearley
Wm. Paterson
Jona: Dayton

Pennsylvania:
B Franklin
Thomas Mifflin
Robt. Morris
Geo. Clymer
Thos. Fitz Simons
Jared Ingersoll
James Wilson
Gouv Morris

Delaware:
Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland:
James McHenry
Dan of St. Thos. Jenifer
Danl Carroll

Virginia:
John Blair—
James Madison Jr.

North Caralina:
Wm: Blount
Richd. Dobbs Spaight
Hu Williamson

South Carolina:
J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia:
William Few
Abr Baldwin

[*Articles in Addition to and Amendment of the Constitution of the United States of America, Proposed by Congress and Ratified by the Legislatures of the several States, Pursuant to the Fifth Article of the Constitution.*]

(ARTICLE I.)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(ARTICLE II.)

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

(ARTICLE III.)

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor, in time of war, but in a manner to be prescribed by law.

(ARTICLE IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(ARTICLE V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(ARTICLE VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defence.

(ARTICLE VII.)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

(ARTICLE VIII.)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(ARTICLE IX.)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(ARTICLE X.)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(ARTICLE XI.)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(ARTICLE XII.)

Section 1.

The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the

President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

(ARTICLE XIII.)

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

(ARTICLE XIV.)

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(ARTICLE XV.)

SECTION 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2.

The Congress shall have power to enforce this article by appropriate legislation.

(ARTICLE XVI.)

The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.

(ARTICLE XVII.)

Section 1.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The Electors in each state shall have the qualifications requisite for Electors of the most numerous branch of the State Legislature.

Section 2.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

Section 3.

This amendment shall not be construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

RATIFICATIONS

OF

THE CONSTITUTION.

The Constitution was adopted by a Convention of the States September 17, 1787, and was subsequently ratified by the several States, in the following order, viz.:

Delaware, December 7, 1787.

Pennsylvania, December 12, 1787.
New Jersey, December 18, 1787.
Georgia, January 2, 1788.
Connecticut, January 9, 1788.
Massachusetts, February 6, 1788.
Maryland, April 28, 1788.
South Carolina, May 23, 1788.
New Hampshire, June 21, 1788.
Virginia, June 26, 1788.
New York, July 26, 1788.
North Carolina, November 21, 1789.
Rhode Island, May 29, 1790.

The State of Vermont, by convention, ratified the Constitution on the 10th of January, 1791, and was, by an act of Congress of the 18th of February, 1791, "received and admitted into this Union as a new and entire member of the United States of America."

RATIFICATIONS OF THE AMENDMENTS TO THE CONSTITUTION.

THE first ten articles of amendment (with two others which were not ratified by the requisite number of States) were submitted to the several State Legislatures by a resolution of Congress which passed on the 25th of September, 1789, at the first session of the First Congress, and were ratified by the Legislatures of the following States:

New Jersey, November 20, 1789.
Maryland, December 19, 1789.
North Carolina, December 22, 1789.
South Carolina, January 19, 1790.
New Hampshire, January 25, 1790.
Delaware, January 28, 1790.

Pennsylvania, March 10, 1790.
New York, March 27, 1790.
Rhode Island, June 15, 1790.
Vermont, November 3, 1791.
Virginia, December 15, 1791.

The acts of the Legislatures of the States ratifying these amendments were transmitted by the governors to the President, and by him communicated to Congress. The Legislatures of Massachusetts, Connecticut, and Georgia, do not appear by the record to have ratified them.

The eleventh article was submitted to the Legislatures of the several States by a resolution of Congress passed on the 5th of March, 1794, at the first session of the Third Congress; and on the 8th of January, 1798, at the second session of the Fifth Congress, it was declared by the President, in a message to the two Houses of Congress, to have been adopted by the Legislatures of three fourths of the States, there being at that time sixteen States in the Union.

The twelfth article was submitted to the Legislatures of the several States, there being then seventeen States, by a resolution of Congress passed on the 12th of December, 1803, at the first session of the Eighth Congress; and was ratified by the Legislatures of three fourths of the States, in 1804, according to a proclamation of the Secretary of State dated the 25th of September, 1804.

The thirteenth article was submitted to the Legislatures of the several States, there being then thirty-six States, by a resolution of Congress passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress, and was ratified, according to a proclamation of the Secretary of State dated December 18, 1865, by the Legislatures of the following States:

Illinois, February 1, 1865.
Rhode Island, February 2, 1865.
Michigan, February 2, 1865.
Maryland, February 3, 1865.
New York, February 3, 1865.
West Virginia, February 3, 1865.
Maine, February 7, 1865.
Kansas, February 7, 1865.
Massachusetts, February 8, 1865.
Pennsylvania, February 8, 1865.
Virginia, February 9, 1865.
Ohio, February 10, 1865.
Missouri, February 10, 1865.
Indiana, February 16, 1865.
Nevada, February 16, 1865.
Louisiana, February 17, 1865.
Minnesota, February 23, 1865.
Wisconsin, March 1, 1865.
Vermont, March 9, 1865.
Tennessee, April 7, 1865.
Arkansas, April 20, 1865.
Connecticut, May 5, 1865.
New Hampshire, July 1, 1865.
South Carolina, November 13, 1865.
Alabama, December 2, 1865.
North Carolina, December 4, 1865.
Georgia, December 9, 1865.

The following States not enumerated in the proclamation of the Secretary of State also ratified this amendment:

Oregon, December 11, 1865.
California, December 20, 1865.
Florida, December 28, 1865.
New Jersey, January 23, 1866.
Iowa, January 24, 1866.
Texas, February 18, 1870.

The fourteenth article was submitted to the Legislatures of the several States, there being then thirty-seven States, by a resolution of Congress passed on the 16th of June, 1866, at the first session of the Thirty-ninth Congress; and was ratified, according to proclamation of the Secretary of State dated July 28, 1868, by the Legislatures of the following States:

Connecticut, June 30, 1866.
New Hampshire, July 7, 1866.
Tennessee, July 19, 1866.
[1]New Jersey, September 11, 1866.
[2]Oregon, September 19, 1866.
Vermont, November 9, 1866.
New York, January 10, 1867.
[3]Ohio, January 11, 1867.
Illinois, January 15, 1867.
West Virginia, January 16, 1867.
Kansas, January 18, 1867.
Maine, January 19, 1867.
Nevada, January 22, 1867.
Missouri, January 26, 1867.
Indiana, January 29, 1867.
Minnesota, February 1, 1867.
Rhode Island, February 7, 1867.
Wisconsin, February 13, 1867.
Pennsylvania, February 13, 1867.
Michigan, February 15, 1867.
Massachusetts, March 20, 1867.
Nebraska, June 15, 1867.
Iowa, April 3, 1868.
Arkansas, April 6, 1868.

[1] New Jersey withdrew her consent to the ratification on March 27, 1868.

[2] Oregon withdrew her consent to the ratification October 15, 1868.

[3] Ohio withdrew her consent to the ratification in January, 1868.

Florida, June 9, 1868.
[1]North Carolina, July 4, 1868.
Louisiana, July 9, 1868.
[1]South Carolina, July 9, 1868.
Alabama, July 13, 1868.
[1]Georgia, July 21, 1868.
Mississippi, January 17, 1870.
Texas, February 18, 1870.

[1] Virginia ratified this amendment on the 8th of October, 1869, subsequent to the date of the proclamation of the Secretary of State. Delaware, Maryland, and Kentucky rejected the amendment.

The fifteenth article was submitted to the Legislatures of the several States, there being then thirty-seven States, by a resolution of Congress passed on the 27th of February, 1869, at the first session of the Forty-first Congress; and was ratified, according to a proclamation of the Secretary of State dated March 30, 1870, by the Legislatures of the following States:

Nevada, March 1, 1869.
West Virginia, March 3, 1869.
North Carolina, March 5, 1869.
Louisiana, March 5, 1869.
Illinois, March 5, 1869.
Michigan, March 8, 1869.
Wisconsin, March 9, 1869.
Massachusetts, March 12, 1869.
Maine, March 12, 1869.
South Carolina, March 16, 1869.
Pennsylvania, March 26, 1869.
Arkansas, March 30, 1869.
[2]New York, April 14, 1869.

[1] North Carolina, South Carolina, Georgia, and Virginia had previously rejected the amendment.

[2] New York withdrew her consent to the ratification January 5, 1870.

Indiana, May 14, 1869.
Connecticut, May 19, 1869.
Florida, June 15, 1869.
New Hampshire, July 7, 1869.
Virginia, October 8, 1869.
Vermont, October 21, 1869.
Alabama, November 24, 1869.
Missouri, January 10, 1870.
Mississippi, January 17, 1870.
Rhode Island, January 18, 1870.
Kansas, January 19, 1870.
[1]Ohio, January 27, 1870.
Georgia, February 2, 1870.
Iowa, February 3, 1870.
Nebraska, February 17, 1870.
Texas, February 18, 1870.
Minnesota, February 19, 1870.

[2] The State of New Jersey ratified this amendment on the 21st of February, 1871, subsequent to the date of the proclamation of the Secretary of State.

The States of California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected this amendment.

The sixteenth article was passed by a resolution of Congress July 12, 1909; proclaimed by the Secretary of State, Philander C. Knox, as part of the Constitution February 25, 1913, there then being forty-eight States. The article was ratified by the States as follows:

Alabama, August 17, 1909.
Kentucky, February 9, 1910.
South Carolina, February 19, 1910.
Illinois, March 1, 1910.
Mississippi, March 7, 1910.
Oklahoma, March 14, 1910.

[1] Ohio had previously rejected the amendment May 4, 1869.
[2] New Jersey had previously rejected the amendment.

Maryland, April 8, 1910.
Georgia, August 3, 1910.
Texas, August 17, 1910.
Ohio, January 19, 1911.
Idaho, January 20, 1911.
Oregon, January 23, 1911.
Washington, January 26, 1911.
Montana, California, January 31, 1911.
Indiana, February 6, 1911.
Nevada, February 8, 1911.
Nebraska, North Carolina, February 11, 1911.
Colorado, February 20, 1911.
North Dakota, February 21, 1911.
Michigan, February 23, 1911.
Iowa, February 27, 1911.
Missouri, March 16, 1911.
Maine, March 31, 1911.
Tennessee, April 7, 1911.
Arkansas, April 22, 1911.
Wisconsin, May 26, 1911.
New York, July 12, 1911.
South Dakota, February 3, 1912.
Arizona, April 9, 1912.
Minnesota, June 11, 1912.
Delaware, Wyoming, February 3, 1913.
New Jersey, New Mexico, February 5, 1913.

The States of Rhode Island, New Hampshire, Kentucky and Utah rejected this amendment.

The seventeenth article was passed by a resolution of Congress June 12, 1911; proclaimed by the Secretary of State, William J. Bryan, as part of the Constitution May 31, 1913, there then being forty-eight States. The article was ratified by the States as follows:

Massachusetts, May 22, 1912.
Arizona, June 3, 1912.

Minnesota, June 10, 1912.
New York, January 13, 1913.
Kansas, January 17, 1913.
Oregon, January 23, 1913.
North Carolina, January 25, 1913.
Michigan, California, January 28, 1913.
Idaho, January 31, 1913.
West Virginia, February 4, 1913.
Nebraska, February 5, 1913.
Iowa, February 6, 1913.
Washington, Montana, Texas, February 7, 1913.
Wyoming, February 11, 1913.
Illinois, Colorado, February 13, 1913.
North Dakota, February 18, 1913.
Nevada, Vermont, February 19, 1913.
Maine, February 20, 1913.
New Hampshire, February 21, 1913.
Oklahoma, February 24, 1913.
Ohio, February 25, 1913.
South Dakota, February 27, 1913.
Indiana, March 6, 1913.
Missouri, March 7, 1913.
Tennessee, April 1, 1913.
Arkansas, April 14, 1913.
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